THE LAW OF

SURETYSHIP AND GUARANTY,

AS

ADMINISTERED BY COURTS OF COUNTRIES
WHERE THE COMMON LAW
PREVAILS.

BY

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PREFACE.

THE object sought in this work is to present a comprehensive view of the law of Suretyship and Guaranty, as administered by courts of countries where the common law prevails.

To that end all the reports have been examined by the author, and the points decided in such cases as related to sureties and guarantors have been carefully noted.

The following pages, it is believed, contain references to substantially all the reported cases bearing on the subject treated of herein.

It is hoped that the great difficulty of arranging into a convenient form for reference the mass of material, covering, as it does, almost every phase of the transactions of men with each other, has been in a measure overcome.

GEORGE W. BRANDT.

CHICAGO, July, 1878.

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THE LAW OF

SURETYSHIP AND GUARANTY.

CHAPTER I.

OF THE CONTRACT.

§ 1. **What is a surety or guarantor—Difference between them.**— A surety or guarantor, is one who becomes responsible for the debt, default or miscarriage of another person.[1] The words surety and guarantor are often used indiscriminately as synonymous terms; but while a surety and a guarantor have this in common, that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. Usually he will not be protected, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the prin-

[1] In Jones *v.* Whitehead, 4 Ga. 397, Lumpkin J. said: "Suretyship has been defined to be a lame substitute for a thorough knowledge of human nature." For a careful and excellent statement of what a surety is, see Smith *v.* Shelden, 35 Mich. 42, per Cooley, C. J.

cipal is not his contract, and he is not bound to take notice of its non-performance. He is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the default of the principal.[1] "The rules of the common law as to sureties are not strictly applied to guarantors, but rather the rules of the law merchant, and the true distinction seems to be this: That a surety is in the first instance answerable for the debt for which he makes himself responsible, and his contracts are often specialties, while a guarantor is only liable when default is made by the party whose undertaking is guarantied, and his agreement is one of simple contract."[2] The principal and surety being directly and equally bound, may be sued jointly in the same suit, while the guarantor being bound by a separate contract and only collaterally liable, cannot usually be joined in the same suit with the principal.[3]

§ 2. **Origin and requisites of the contract.**—The party to whom the surety or guarantor becomes bound is called the creditor or obligee. The party for whom he becomes bound is called the principal or principal debtor. The surety or guarantor becomes such by means of contract. Some of the earliest contracts mentioned in history were those of suretyship, and the origin of the contract is shrouded in the mists of antiquity. Some at least of the incidents of suretyship were well understood in the remotest times. In the Bible it is written, "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure."[4] To constitute the contract of suretyship or guaranty, the same things are necessary as to constitute any other contract, viz.: That the parties be competent to contract; that they actually do contract, and that the contract if not under seal be supported by

[1] McMillan v. Bull's Head Bank, 32 Ind. 11; Reigart v. White, 52 Pa. St. 438; Gaff v. Sims, 45 Ind. 262; Kramph's Ex'x. v. Hatz's Exrs., 52 Pa. St. 525; Allen v. Hubert, 49 Pa. St. 259; Harris v. Newell, 42 Wis. 687.

[2] Hubbard, J., in Curtis v. Dennis, 7 Metcalf 510; in Kearnes v. Montgomery, 4 West Va. 29, Maxwell, J., said: "The contract of a guarantor is collateral and secondary. It differs in that respect from the contract of a surety which is direct; and in general the guarantor contracts to pay if by the use of due diligence the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default."

[3] Read v. Cutts, 7 Greenleaf, 186.

[4] Proverbs xi, 15.

a sufficient consideration. Any one competent to contract generally may enter into the contract of suretyship or guaranty.

§ 3. **When guaranty by infant, railroad company and bank valid, and by city void.**—The contract of suretyship or guaranty made by an infant is not void, but may be ratified by him upon arriving at majority. But in order to charge one who was an infant when he made such a contract, it is necessary to show that subsequent to the time he became of age he had full knowledge that he was not bound, and afterwards distinctly ratified the contract.[1] Where, under the laws of Iowa, a railroad company had power to issue its own bonds to pay for the construction of its road, it was held it might guaranty the bonds of cities and counties which had been lawfully issued and were the means of accomplishing the same end.[2] A bank may guaranty the payment of bonds pledged by its debtor to a third person as collateral security for money with which the debtor pays the bank, even though the bonds have never been assigned to the bank.[3] In the last two cases the guarantor accomplished a legitimate object by means of its guaranty and did not assume any more onerous obligation than if it had issued its own bonds in the one case or guarantied bonds assigned to it in the other. But where the municipal government of New Orleans guarantied certain notes of a corporation whose purpose it was to open up navigation through a portion of the city, it was held the guaranty was void, because the city had no authority to make it, although the city might lawfully have opened up the navigation. The court said: "It can hardly be maintained as a legal proposition that for every act for which an agent may expend money for his principal he can bind his principal in a contract of suretyship. * The open and direct appropriation and expenditure of money by officers of a municipal corporation has nothing in it in common with the contingent and long enduring contract of suretyship."[4]

[1] Owen *v.* Long, 112 Mass. 403; Hinely *v.* Margaritz, 3 Pa. St. 428; Fetrow *v.* Wiseman, 40 Ind. 148.

[2] Railroad Company *v.* Howard, 7 Wallace, 392. In Arnot *v.* Erie R. R. Co., 5 Hun, 608, one railroad company guarantied the interest coupons on certain bonds of another railroad company. The bonds afterwards came into possession of the guarantor, and it transferred them for value. Held, it was estopped to deny its liability upon the guaranty of the coupons.

[3] Talman *v.* Rochester City Bank, 18 Barbour, 123.

[4] Louisiana State Bank *v.* Orleans Navigation Company, 3 La. An. 294, per Eustis, C. J.

§ 4. **When married woman may become surety by virtue of statute.—When statute says party shall not be received as surety, he is nevertheless bound if he is received as such.**—A married woman cannot, unless enabled by statute, become surety for her husband or a stranger.[1] She cannot bind herself nor her separate property either at law or in equity by such a contract. The contract is absolutely void at law, and equity will not charge her separate estate where she has received no benefit.[2] In many States, by statute, a married woman may hold, manage and contract with reference to her separate property the same as if she was unmarried. She cannot, however, by virtue of such a statute become a surety. The intention was, by such statutes, to remove her disabilities for her interest, and not to enable her to contract onerous obligations from which she derived no benefit.[3] But where a statute provided that a married woman might contract the same as a *feme sole*, it was held that she might lawfully mortgage her homestead for an existing debt of her son.[4] So where a statute provided that the "contract of any married woman made for any lawful purpose * (should) be valid and binding and * (might) be enforced in the same manner as if she were sole," it was held that a married woman might become a surety, the contract of suretyship being a lawful contract, and in that case, for a lawful purpose.[5] A statute providing that attorneys shall not be received as bail, in a criminal case, is constitutional,[6]

[1] Firemen's Ins. Co. *v.* Cross, 4 Robinson (La.) 508; Gosman *v.* Cruger, 7 Hun, 60.

[2] Yale *v.* Dederer, 18 New York, 265; Perkins *v.* Elliott, 8 C. E. Green (N. J.) 526.

[3] Athol Machine Co. *v.* Fuller, 107 Mass. 437; in West *v.* Laraway, 28 Mich. 464, where a married woman had signed a note with her husband as his surety, it was contended that although she was not personally bound, the note operated as a charge on her separate estate. But the court held otherwise, and said that if such were the case she would be in a worse position than a man or a *feme sole*, because a note by either of them would not be a lien on their property. In De Vries *v.* Conklin, 22 Mich. 255, the court in speaking of the married woman's statute said: "The disabilities are removed only so far as they operated unjustly and oppressively; beyond that they are suffered to remain. Having been removed with the beneficent design to protect the wife in the enjoyment and disposal of her property for the benefit of herself and her family, the statute cannot be extended by construction to cases not embraced by its language nor within its design."

[4] Low *v.* Anderson, 41 Iowa 476.

[5] Mayo *v.* Hutchinson, 57 Maine, 546.

[6] Johnson *v.* Commonwealth, 2 Duvall (Ky.) 410.

but such a statute is only directory, and if an attorney signs a bail bond and is received as bail he is bound notwithstanding the prohibition of the statute.[1] Where a statute provided that bail should be a resident of the State, a non-resident who was accepted as bail was held bound.[2] A statute provided that administrators should take notes with two sureties for certain debts due estates. A note in such case was taken with only one surety, and he was held liable, it not appearing that any fraud or imposition had been practiced upon him.[3]

§ 5. **When duress a defense to surety or guarantor.**—If the surety or guarantor acts under duress in entering into the contract, he will not be bound.[4] And this for the same reason that a person sought to be charged on a contract of any other kind would not be bound, viz., because he never consented to it. But when the duress is exercised on the principal alone, a different question arises. It has been held that the duress of the principal, who is a stranger to the surety, will be no defense to the surety.[5] It has also been held, and it seems with the better reason, that the duress of the principal alone is a complete defense to the surety.[6] Where a statutory bond for the liberties of a prison was executed by the principal under duress, if the principal with the knowledge and consent of the surety claims and exercises the right of being on the liberties by virtue of such bond, they are both estopped to allege its invalidity.[7] Where a creditor caused the arrest of a debtor and under a threat of sending him to state's prison forced him to sign a note, and his wife, who was then in a delicate condition, was induced by the same

[1] Sherman *v.* The State, 4 Kansas, 570; Jack *v.* The People, 19 Ill. 57; Holandsworth *v.* Commonwealth, 11 Bush, 617. In the case last cited the court said: "If those of the exempted or priviliged classes persist in tendering themselves as bail, and by becoming such procure the discharge of persons accused of crime, they will not be heard to say that they are not bound because they violated the law."

[2] Commonwealth *v.* Ramsay, 2 Duvall (Ky.) 386.

[3] Reynolds *v.* Dechaums, 24 Texas, 174.

[4] Small *v.* Currie, 2 Drewry, 102.

[5] Wayne *v.* Sands, Freeman, 351; Simmons *v.* Barefoots' Exrs. 2 Haywood, (Nor. Car.) 606; Thompson *v.* Buckhannon, 2 J. J. Marsh. 416.

[6] Hawes *v.* Marchant, 1 Curtis, 136; Owens *v.* Mynatt, 1 Heiskell (Tenn.) 675. The reason given in the last case is that if it were otherwise, the surety being compelled to pay, could recover from his principal and thus the principal be deprived of his defense. See, also, Putnam *v.* Schuyler, 4 Hun, 166.

[7] Hawes *v.* Marchant, 1 Curtis, 136.

threats to indorse the note, it was held she might avail herself of the duress.[1] A State treasurer gave bond with sureties as required by law, and afterwards held over under a constitutional provision, no successor being appointed. While holding over, he was "required and demanded" by the legislature to give a new bond in a much larger amount and gave such bond with sureties. The sureties on the last bond claimed to be discharged on account of duress of their principal, but it was held there was no duress and that they were bound.[2]

§ 6. **There must be a consideration to support the contract—Instances.**—As already stated, the contract of suretyship or guaranty when not under seal, must, in order to render it valid, be supported by a sufficient consideration.[3] A consideration of one dollar is sufficient to support a contract of suretyship or guaranty for any amount, for the law cannot take account of the prudence or imprudence of the bargain the surety or guarantor has made.[4] But there must be some consideration, usually either of benefit to the principal or surety, or detriment to the creditor, to support the contract. Leaving a claim in the hands of an attorney to control and collect, is a sufficient consideration for a contemporaneous guaranty of the claim by him.[5] The liability of a surety on a note is a sufficient consideration for his subsequent written guaranty of its payment, whether at the date of the guaranty the right of action on the note is or is not barred by the statute of limitations.[6] A married woman without consideration became surety on the note of her husband. After the death of the husband she gave a new note for the

[1] Ingersoll *v.* Roe, 65 Barb. (N. Y.) 346. In Thompson *v.* Buckhannon, 2 J. J. Marsh. 416, Robertson J. said: "If an officer *colore officii* exacts a bond to himself which he has no authority to require, the security may avoid it as well as the principal, because being not only unauthorized but positively prohibited, it is totally void."

[2] Sooy *ads.* State, 38 New Jer. Law 324.

[3] Pfeiffer *v.* Kingsland, 25 Mo. 66; Barrell *v.* Trussell, 4 Taunt. 117–20; Saunders *v.* Wakefield, 4 Barn. & Ald. 595; Bailey *v.* Freeman, 4 Johns. 280; Leonard *v.* Vredenburgh, 8 Johns. 29; Cobb *v.* Page, 17 Pa. St. 469; French *v.* French, 2 Man. & Gr. 644; Aldridge *v.* Turner, 1 Gill & Johns. (Md.) 427; Tenney *v.* Prince, 4 Pick. 385; Clark *v.* Small, 6 Yerg. (Tenn.) 418.

[4] Lawrence *v.* McCalmont, 2 Howard (U. S.) 426; Jackson's Adm'r. *v.* Jackson, 7 Ala. 791.

[5] Gregory *v.* Gleed, 33 Vermont, 405.

[6] Miles *v.* Linnell, 97 Mass. 298; see on same subject, Buckner *v.* Clark's Exr., 6 Bush, 168.

amount of the former note and another note signed by her husband alone. Afterwards she gave another note and a mortgage to secure it, the only consideration for the last note being the note signed by her after her husband's death. It was held that all the papers executed by her were void for want of consideration.[1] One B, the assignee of a lease, assigned the lease to W, taking from W and from R, his surety, an agreement to pay the rent. Held, this agreement was void for want of consideration. B was liable for rent only so long as he held as assignee of the lease, and W by accepting the assignment of the lease became liable for rent to the owner of the premises and not to B.[2]

§ 7. **Executory consideration to principal alone sufficient.**—It is not necessary to the validity of the consideration that any portion of it should move from the creditor to the surety or guarantor, provided the circumstances are such that a previous request on the part of the surety or guarantor is held to exist. A consideration moving to the principal alone contemporaneous with or subsequent to the promise of the surety or guarantor is sufficient.[3] If after the original consideration has moved between the creditor and principal, the surety or guarantor signs upon a new consideration, moving from the creditor to the principal, this is sufficient.[4] When a guaranty on a note is without date, a jury may infer without further proof that it was made at the same time and on the same consideration as the note.[5] Where a promise that a surety or guarantor will become liable is part of the inducement on which the creditor acts in creating the original debt, this is a sufficient consideration to support the contract of the surety or guarantor who subsequently signs. A told B that if C would lend B money, he, A, would be surety for it. B communicated this to C, and on the strength of it C loaned B money and took his note for it, due in one year. Three days

[1] Hetherington *v.* Hixon 46 Ala., 297.

[2] Stoppani *v.* Richard, 1 Hilton (N. Y.) 509.

[3] Wren *v.* Pearce, 4 Smedes & Marsh. (Miss.) 91; Freeman *v.* Freeman, 2 Bulst. 269; Bailey *v.* Croft, 4 Taunt. 611; Henderson *v.* Rice, 1 Cold. (Tenn.) 223; Robertson *v.* Findley, 31 Mo. 384; Leonard *v.* Vredenburgh, 8 Johns. 29; Morley *v.* Boothly, 10 Moore, 395; Bicksford *v.* Gibbs, 8 Cush. 154; McNaught *v.* McClaughry, 42 New York, 22.

[4] Gay *v.* Mott, 43 Ga. 252.

[5] Bickford *v.* Gibbs, 8 Cush. 154; Underwood *v.* Hossack, 38 Ill. 208. On the same subject, see Snevily *v.* Johnston, 1 Watts & Serg. 307.

after the note became due A signed it, and he was held bound.[1] A principal executed and delivered a note to a creditor which specified no time of payment, and at the same time agreed that he would procure B to sign as surety if at any time the creditor should deem himself insecure. Afterwards the creditor returned the note to the principal, with the request that he should get B to sign, which he did, and B was held liable.[2] The same principle was applied in a case where A sold B goods on the promise by B that C would guaranty the payment, and C guarantied the payment of the note given by B for the price of the goods about three hours after the note was given.[3] So a guaranty is binding when goods are contracted for one day by the principal, and the guaranty is executed the next day and delivered to the seller before the goods are delivered by him, because the sale was not complete till the goods were delivered.[4] A principal signed an undertaking, and at that time it was agreed between the principal and creditor that certain other parties should sign it as sureties. The writing was delivered by the principal to the creditor when it was signed, and the creditor afterwards and at another time presented it to the sureties, who signed it, and it was held they were bound.[5]

§ 8. **Agreement by creditor to forbear towards principal sufficient.**—An agreement on the part of the creditor to extend [illegible]

[1] Paul v. Stackhouse, 38 Pa. St. 302. The same principle was held in the case of a sale of goods by C to B under similar circumstances, Standley v. Miles, 36 Miss. 434.

[2] McNaught v. McClaughry, 42 New York, 22.

[3] Wheelwright v. Moore, 2 Hall (N. Y.) 162. With reference to what is sufficient consideration for guaranty of promissory note by payee, who also indorses it, see Gilligham v. Boardman, 29 Me. 79.

[4] Simmons v. Keating, 2 Starkie, 375.

[5] Williams v. Perkins, 21 Ark. 18. Compton, J. said: "If the debt or obligation of the principal debtor is already incurred previous to the undertaking of the surety, then there must be a new and distinct consideration to sustain the promise of the sur[illegible]. But if the obligation of the pri[illegible] debtor be founded upon a good [illegible]sideration, and at the time it is in[illegible] or before that time the promise [illegible] surety is made and enters in[illegible] inducement for giving the c[illegible] the consideration for which [illegible] pal debt is created is con[illegible] valid consideration also for [illegible] taking of the surety. [illegible] the signatures of the p[illegible] were procured at one ti[illegible] of the sureties afterw[illegible] in contemplation of [illegible] were contempor[illegible] part of one and the [illegible] saction, and the [illegible] which supports [illegible] also supports [illegible]

time of payment to the principal for a definite time, is a sufficient consideration for the contract of suretyship or guaranty, the one agreement being a consideration for the other, and the delay usually operating both as a benefit to the principal and a detriment to the creditor.[1] An agreement for forbearance for one year,[2] for a convenient time,[3] on an over-due note, for four years,[4] for a considerable time,[5] or for a reasonable time,[6] are any of them a sufficient consideration. An agreement on the part of the creditor for general indulgence toward the principal, without any definite time being specified, with proof of actual forbearance for a reasonable time is sufficient.[7] An agreement for delay in consideration of further forbearance, means forbearance for a convenient or reasonable time.[8] But in order that forbearance by the creditor towards the principal may be a sufficient consideration, there must be an agreement on the part of the creditor that he will forbear. Mere forbearance or omission on the part of the creditor to exercise his legal right without any agreement to that effect, is not sufficient, because he may at any moment, and at his own pleasure, proceed. There must be promise for promise.[9] An agreement to withdraw, and the withdrawal of a suit or other proceeding against a principal is also a sufficient consideration.[10]

§ 9. **Executed consideration to principal not sufficient—Damage to creditor sufficient.**—Where the consideration between the principal and creditor has passed and become executed before the

[1] Fuller *v.* Scott, 8 Kansas, 25; Underwood *v.* Hossack, 38 Ill. 208; Pulliam *v.* Withers, 8 Dana (Ky.), 98.

[2] Sage *v.* Wilcox, 6 Conn. 81.

[3] Sadler *v.* Hawkes, 1 Roll. Abr., 27, pl. 49; Tricket *v.* Mandlee, Sid. 45.

[4] Breed *v.* Hillhouse, 7 Conn. 523.

[5] Mapes *v.* Sidney, Cro. Jac. 683.

[6] Johnson *v.* Whitchcott, 1 Roll. Abr., 24 pl., 33; Lonsdale *v.* Brown, 4 Wash., 148.

[7] Thomas *v.* Croft, 2 Richardson Law (So. Car.) 113; Elting *v.* Vanderlyn, 4 Johns. 237; Oldershaw *v.* King, 2 Hurl. & Nor. 520; Rowlett *v.* Ewbank, 1 Bush (Ky.) 477.

[8] Caldwell *v.* Heitshur, 9 Watts & Serg. 51; Oldershaw *v.* King, 2 Hurl. & Nor. 520.

[9] Shupe *v.* Galbraith, 32 Pa. St. 10; Walker *v.* Sherman, 11 Met. (Mass.) 170; Mecorney *v.* Stanley, 8 Cush. (Mass.) 85; Breed *v.* Hillhouse, 7 Conn. 523; Crofts *v.* Beale, 11 Com. B. 172; Sage *v.* Wilcox, 6 Conn. 81. It was held in some old cases which have not been generally followed in later times, that an agreement to forbear for an indefinite period, Phillips *v.* Shackford, Cro. Eliz. 455, or for a short, Tolhurst *v.* Brickinden, Cro. Jac. 250, or some, Tricket *v.* Mandlee, Sid. 45, or a little time, 1 Roll. Abr. 23, would not be a sufficient consideration.

[10] Worcester Savings Bank *v.* Hill, 113 Mass. 25; Harris *v.* Venables, Law Rep. 7 Exch. 235.

contract of the surety or guarantor is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract.[1] One person entered into a contract with another by which he was to receive such other's promissory note without surety and the note was made and received. Afterwards the payee requested the maker to get a surety, and the maker took the note and had it subscribed by a third person, and returned it to the payee. There was no new consideration, and it was held the surety was not bound.[2] But where a bond was executed by the obligors and the obligee refused to receive it unless it was guarantied, and A thereupon guarantied it without any request from the obligors, and the obligee thereupon accepted the bond, it was held that the acceptance of the bond was a sufficient consideration for the guaranty.[3] A party sold a horse to another, being misled by false statements and representations of the purchaser, and took a note for the price. Discovering the fraud, the seller was about to rescind the contract and reclaim the horse. Upon being informed of these facts two days after the note was made, a surety put his name to the note and in consequence the property was not reclaimed. It was held that not reclaiming the horse was a good consideration for the agreement of the surety.[4] A guaranty

[1] Tomlinson v. Gell, 6 Ad. & Ell. 564; Yale v. Edgerton, 14 Minn. 194; Williams v. Marshall, 42 Barb. 524; Thomas v. Williams, 10 Barn. & Cres. 664; Pratt v. Hedden, 121 Mass. 116; Farnsworth v. Clark, 44 Barb. 601; Eastwood v. Kenyon, 11 Ad. & Ell. 438; Ludwick v. Watson, 3 Oreg. 256; Parker v. Bradley, 2 Hill, 584; Hunt v. Bate, Dyer 272 (a); Stewart v. Hinkle, 1 Bond, 506; Leonard v. Vredenburgh, 8 Johns. 29; French v. French, 2 Man. & Gr. 644; McCreary v. VanHook, 35 Tex. 631; Wood v. Benson, 2 Cr. & Jer. 94; 1 Roll. Abr. 27 pl. 49; Ashton v. Bayard, 71 Pa. St. 139; Payne v. Wilson, 7 Barn. & Cres. 423; Ellenwood v. Fults, 63 Barb. 321; Bessheears v. Rowe, 46 Mo. 501; Lossee v. Williams, 6 Lans. 228; Harris v. Young, 40 Ga. 65; Sawyer v. Fernald, 59 Me. 50); Uhler v. Farmers' National Bank, 64 Pa. St. 406; Davis v. Banks, 45 Ga. 138; Badger v. Barnabee, 17 New Hamp. 120; Brown v. Brown, 47 Mo. 130; Ware v. Adams, 24 Me. 177; Clompton's Exrs. v. Hall, 51 Miss. 482.

[2] Jackson v. Jackson, 7 Ala. 791. The court, Collier, C. J., among other things, said: "Any act in the nature of a benefit to the person who promises, or to any other person upon his request, or any act which is a trouble or detriment to him to whom the promise is made, is sufficient, and the amount of benefit or of trouble or detriment or its comparative value in relation to the promise is indifferent." See, also, Thorner v. Field, 1 Bulstr. 120; Hunt v. Bate, 3 Dyer, 272 (a).

[3] Gardner v. King, 2 Ired. Law (Nor. Car.) 297.

[4] Harwood v. Kiersted, 20 Ill. 367.

of past and future advances made and to be made to a third person, is good for the whole and the consideration sufficient.[1] But there must be an agreement on the part of the creditor to make the future advances, or he must actually make them, or there will be no consideration for the agreement to pay for the past advances and it will be void.[2] It is not necessary that the consideration should consist of a benefit to the principal or surety. Any trouble, detriment or inconvenience to the creditor is sufficient.[3] When the consideration moves directly between the surety or guarantor and the creditor, the same rules apply which prevail with reference to the consideration for any other contract.[4]

§ 10. **How far partner can bind firm or agent can bind principal, as surety or guarantor.**—One partner cannot usually bind the firm as sureties or guarantors for another.[5] The reason is, that the business of a partnership is not commonly that of making contracts as sureties or guarantors; and the partner who makes such a contract, acts outside the scope of his implied authority as agent of the firm. One member of a firm of attorneys has no right, in consideration of the discharge of their client from custody, to bind the firm to pay the debt of such client, and the costs of suit.[6] So where certain partners were railroad contractors, and

[1] Hargroves *v.* Cook, 15 Ga. 321; White *v.* Woodward, 5 Com. B. 810; Chapman *v.* Sutton, 2 Com. B. 634; Russell *v.* Moseley, 3 Bro. & Bing. 211. To the same effect with reference to attorneys' fees, see Roberts *v.* Griswold, 35 Vt. 496; also with reference to rent, see Vinal *v.* Richardson, 13 Allen, 521. To same effect as above, see Boyd *v.* Moyle, 2 Man. Gr. & S. 644; *contra*, Wood *v.* Benson, 2 Cromp. & Jer. 94.

[2] Westhead *v.* Sproson, 6 Hurl. & Nor. 728; Morrell *v.* Cowan, Law Rep., 6 Eq. Div. 166; Boyd *v.* Moyle, 2 Com. B. 644.

[3] Wells *v.* Mann, 45 New York, 327; Colgin *v.* Henley, 6 Leigh (Va.) 85; Morley *v.* Boothly, 10 Moore, 395; Pillans *v.* Van Mierop, 3 Burr. 1663.

[4] Leonard *v.* Vredenburgh, 8 Johns. 29; Smith *v.* Finch, 2 Scam. (Ill.) 321.

[5] McQuewans *v.* Hamlin, 35 Pa. St. 517; Sutton *v.* Irwine, 12 Serg. & Rawle, 13; Rolston *v.* Chick, 1 Stew. (Ala.) 526; Sweetser *v.* French, 2 Cush. 309; Mayberry *v.* Bainton, 2 Harrington (Del.) 24; Duncan *v.* Lowndes, 3 Camp. 478; Crawford *v.* Stirling, 4 Esp. 207.

[6] Hasleham *v.* Young, 5 Ad. & Ell. (N. S.) 833; *Id.* Dav. & Mer. 700. In Mauldin *v.* Branch Bank at Mobile, 2 Ala. 502, the court said, if an unauthorized indorsement by one member of a firm was on commercial paper, an innocent indorsee might recover against the firm. In Fuller *v.* Scott, 8 Kansas, 25, when it was proved that a firm indorsed a note in blank in the firm name, the court said: "It would then be presumed that such indorsement was made in the firm business."

sub-let a portion of their work to A, and it was necessary for A to have brick to carry on the work, and he could not get them without coal, and one of the partners, without the knowledge of the others, gave a guaranty in the firm name for coal bought by A for that purpose, it was held the guaranty did not bind the partnership.[1] Where, however, the partner who attempts to bind the firm has special authority for that purpose from the other members, he may bind the firm the same as any other agent having authority. So where the making of such a contract is within the usual scope of the business of the firm, it may be bound by the act of one partner in that regard. When the contract is made by a partner without authority, if the other members of the firm afterwards adopt it and act on it the firm will be bound.[2] A firm sold a steamboat to A, and he gave a note for the purchase money to B, who was a creditor of the firm, in payment of the firm debt, and one of the firm signed the name of the firm to the note as sureties. It was held that the firm was bound, because it was in fact their own debt and not the debt of another that the note paid, and the substance and not the form of the transaction should be looked to.[3] One firm may become the surety of another firm, the same as one individual may become the surety of another.[4] A party authorized to sign another's name as surety, must pursue his authority strictly in order to bind the principal. Thus where a party was authorized to sign the name of A as surety to a note and he signed the name of A to the note as a principal, it was held A was not bound.[5] One who is acting as agent of another, and as such, writing letters in his name, collecting money and giving receipts for the same in his name, indorsing bank checks, etc., has no power without special authority to bind his principal by the guaranty of the debt of a third person.[6] So an agent having a general power of attorney to transact business for his principal and sign his name to bonds, notes, etc., in connection with the business of the principal, cannot by virtue of such

[1] Brettel v. Williams, 4 Wels. Hurl. & G. 623.

[2] Crawford *v.* Stirling, 4 Esp. 207; *Ex parte* Gardom, 15 Vesey, 286. See, also, on same subject, Sandilands *v.* Marsh, 2 Barn. & Ald. 673; Hope *v.* Cust, cited in Shirreff *v.* Wilks, 1 East, 53.

[3] Langan *v.* Hewett, 13 Smedes & Marsh. 122.

[4] Allen *v.* Morgan, 5 Humph. (Tenn.) 624.

[5] Bryan *v.* Berry, 6 Cal. 394.

[6] Stevenson *v.* Hoy, 43 Pa. St. 191.

authority bind his principal as surety on a sequestration bond in a matter not connected with the business of the principal.[1]

§ 11. **Where act of principal is prohibited by law, or is fraudulent, surety not bound.**—When the act of the principal for which the surety undertakes to become responsible is prohibited by law, the surety will not be bound. Thus a statute provided that express companies should not do business in the state without recording in every county in which they did business a statement, showing the stockholders' names, residences, etc. An express company without complying with the law, appointed an agent who gave bond with surety for the faithful performance of his duties. The agent collected money for packages sent and failed to pay it over, and it was held the surety was not bound. The bond being given for the performance of an illegal act, viz., sending packages by express, was void.[2] The same thing was held in a case where a statute prescribed the terms on which a foreign insurance company could do business in a State, appoint agents., etc. The court said: "It has often been held that an action founded on a transaction prohibited by statute cannot be maintained, although a penalty be imposed for violating the law, and it be not expressly declared that the contract be void."[3] So where a statute prohibited the making of a lease to a slave, the surety on a lease made to a slave was held not bound.[4] The court said: "The defense set up that the contract under consideration is null and void, because it contravenes public policy, is not a personal exception. If slaves were merely incapacitated from making a contract of lease, the case might be different, but there is no affinity between a prohibitory law, laying down rules of public policy, and one merely incapacitating a party for his own protection or interest." The distinction is here drawn between a prohibition to the principal on the grounds of public policy, and a mere personal exemption of the principal. As will be hereafter seen, a mere personal exemption to the principal, as infancy or coverture, will furnish no defense to the surety. On the same principle the surety on a note may show as a defense that it was given by the principal to pay a gambling debt.[5] So where the

[1] Gates v. Bell, 3 La. An. 62.

[2] Daniels v. Barney, 22 Ind. 207.

[3] Thorne v. Travellers Ins. Co. 80 Pa. St. 15.

[4] Levy v. Wise, 15 La. An. 38.

[5] Leckie v. Scott, 10 La. (5 Curry) 412.

transaction which induces the giving of a note by the principal is fraudulent, the surety is not bound. Thus, A being a trader in embarrassed circumstances, was indebted to B for money lent and goods, and B promised to induce A's creditors to agree to a composition on condition that A would give him a note for the money lent, signed by A and a surety; and it was agreed between A and B that the matter should be kept secret. The note was given, signed by a surety as agreed; B endeavored to effect a composition and failed: Held, the surety was not liable. The fraud was that B, by undertaking to procure the composition, obtained a secret preference, and the note being void in its creation, could not be rendered valid by the subsequent fact that B failed to effect a composition.[1]

§ 12. **Voluntary bond not required by law, or different from bond required, valid.**—The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily, for a valid consideration, and if it is not repugnant to the letter or policy of the law; and the surety on such bond is bound thereby.[2] The voluntary bond of a state treasurer which is not demandable by law,[3] of a county treasurer where there is no law requiring a bond to be given,[4] of a plaintiff in an attachment suit when no bond is required by law,[5] are all valid and bind the sureties who sign them. But where a district judge having no authority to do so requires a father or natural tutor of a child to give bond for the faithful performance of his trust, and such a bond is given, the surety thereon is not liable. The maxim that, as a man consents to bind himself so shall he be bound, is not applicable to such a case, for the bond is not purely voluntary, but is required by the judge from the parties as the condition for the exercise of a function.[6] Where a bond is required by law to be given, the voluntary bond of an executor or administrator to the ordinary, which varies from the form prescribed by the statute,[7] of a cashier containing nothing contrary to

[1] Wells *v.* Girling, 1 Brod. & Bing. 447; *Id.* 4 Moore, 78.

[2] Thompson *v.* Buckhannon, 2 J. J. Marsh. (Ky.) 416; Hoboken *v.* Harrison, 1 Vroom (N. J.) 73.

[3] Sooy *ads.* The State, 38 New Jer. Law, 324.

[4] Supervisors of St. Joseph *v.* Coffenbury, 1 Manning (Mich.) 355.

[5] Lartigue *v.* Baldwin, 5 Martin, O. S. (La.) 193.

[6] Ancion *v.* Guillot, 10 La. An. 124.

[7] Ordinary *v.* Cooley, 1 Vroom (N. J.) 179.

law but varying from the statutory form,[1] of a plaintiff in replevin, in which the condition does not conform to the statute,[2] are all valid and binding on the sureties. Where a statute provided that the bond of a prisoner given for the liberty of the jail yard, should be approved by two justices of the peace, and a bond was given but not approved by the justices, the sureties were held liable. The statutory requirement that the bond should be approved by two justices, was intended to prevent oppression by the creditor in refusing sufficient sureties, and the creditor having accepted the bond, the intention of the statute was complied with.[3] A statute required that a bank cashier should give a bond conditioned for the faithful performance of his duties. The cashier gave a bond which provided for past as well as future delinquencies: Held, the bond was not void because it contained more than provided by statute. Being a voluntary bond and for a lawful purpose, it was good at common law.[4] A statute provided that in all cases where an execution should issue illegally, if affidavit of the fact was filed and a bond given, the execution should be suspended until the matter was determined, but the statute did not prescribe what the condition of the bond should be. An execution was issued to which no seal of the court was attached. An affidavit of its illegality was filed, and a bond given, the condition of which was: "Now if it shall appear that the said writ has not been properly issued in this, that there is no seal to said writ, then the above obligation to be void." The sureties were not liable by the terms of the bond, but the court held them for the amount of the execution suspended, on the ground that as the statute did not prescribe the condition of the bond, its condition must be found in the object of the statute; that it was undoubtedly the intention of the sureties to become bound according to the liabilities imposed by the statute; and that as the object intended by them had been

[1] Grocers' Bank v. Kingman, 16 Gray 473.

[2] Morse v. Hodson, 5 Mass. 314.

[3] Bartlett v. Willis, 3 Mass. 86.

[4] Franklin Bank v. Cooper, 36 Me. 179. In Baker v. Morrison, 4 La. An. 372, a sequestration bond provided that the defendant should not send the property out of the jurisdiction of the court, etc., and should satisfy such judgment as should be rendered by the court. The last provision as to the payment of the judgment, was not required by law, but was inserted by the sheriff. It was held not binding on the surety. The bond, under the circumstances, could not be said to be a voluntary one.

accomplished, they were liable.[1] This case is of very questionable character, running counter, as it does, to the current of authority, which is, that a surety is not bound beyond the strict terms of his engagement. If it can be sustained at all, it can only be, upon its own peculiar circumstances.

§ 13. **Voluntary bond binds surety.**—The principle that the surety in a voluntary bond, made upon good consideration, and which does not contravene the policy of the law or the prohibition of a statute, is liable at common law on such bond, has been applied to a great variety of circumstances. Such a bond is valid, even though another bond be required by statute. Thus, where a statute required a bank cashier to give a bond with two or more sureties, and he gave a bond with only one surety, such surety was held liable. The statute did not say no other bond but the one required should be taken, and was only directory.[2] On the same principle the sureties on an administrator's bond, entered into before a probate judge *de facto* but not *de jure*, were held liable.[3] The sureties on a guardian's bond having become insolvent, the uncle of the minors demanded of the guardian that he give another bond, which he did, with a new surety. No new bond was required by the court, but on a proper showing, one would have been required: Held, the surety on the last bond was bound.[4] So, where a testator by will directed that his executor need give no bond, but the executor falsely represented to A that the court required a surety of him, and thereby induced A to become surety on an executor's bond, which was approved by the court, A was held liable. The fraud which the executor practiced on A would not avoid the bond unless the obligee participated in it.[5] A statute required that tobacco inspectors should give a bond with certain conditions, in the sum of $2,000, and such a bond was given. Two days before the giving of the bond, an amendment to the statute had been passed, requiring a bond of $5,000, and changing the condition somewhat. The bond already given was held to bind the sureties as a common law obligation.[6] Where a statute provided that injunction bonds should be given

[1] Mitchell *v.* Duncan, 7 Florida, 13.

[2] Bank of Brighton *v.* Smith, 5 Allen, 413.

[3] Pritchett *v.* The People, 1 Gilman (Ill.) 525.

[4] Elam *v.* Heirs of Barr, 14 La. An. 682.

[5] Sebastian *v.* Johnson, 2 Duvall (Ky.) 101.

[6] Lane *v.* Kasey, 1 Met. (Ky.) 410.

in the office of the clerk of the court, the judgment of which was enjoined, an injunction bond not thus given was held valid, although the injunction would have been dissolved for want of a proper bond, if objection had been made.[1] The sureties on the bond of a school fund commissioner, whose bond has not been approved by the proper authorities, but who has entered upon and exercised the duties of the office, and appropriated money, are liable on the bond at common law. The bond not being good as a statutory, but as a common law bond, perhaps the common law remedy on it would have to be pursued, and not the statutory remedy on statutory bonds.[2]

§ 14. **Obligation of surety must be delivered, and takes effect from time of delivery.**—In order to bind a surety or guarantor his contract must be delivered, and it takes effect from the time of its delivery. A made a promissory note and delivered it to the payee, and the payee then gave the note to A in order that he might get a surety to it and return it. A got C to sign the note as surety, but then refused to deliver it to the payee. The payee then sued A and C on the note, and it was held that C was not liable.[3] The note had never been delivered after C signed it, as A was in no sense the agent of the payee to receive a delivery of the note. Moreover if C had been compelled to pay the note he could not have recovered indemnity from A, because A by refusing to deliver the note had refused to consent to C being his surety. Where a bond is signed by the principal on Saturday and by the surety on Sunday, but is not delivered till Monday, it takes effect from its delivery and the surety is bound.[4] A law provided that in no case should a bank cashier's bond be signed by a director of the bank as surety. A bank director signed such a bond as surety, but it was not approved till his term as director expired. Held, the bond took effect from the time of its approval and the surety was bound.[5]

§ 15. **Surety bound when his name not mentioned in body of instrument—Not bound when penalty of bond blank.**—Although

[1] Cobb *v.* Curts, 4 Littell, (Ky.) 235.

[2] The State *v.* Fredericks, 8 Iowa, 553.

[3] Chamberlain *v.* Hopps, 8 Vt. 94.

[4] Commonwealth *v.* Kendig, 2 Pa. St. 448. To similar effect, see State *v.* Young, 23 Minn. 551.

[5] Franklin Bank *v.* Cooper, 36 Me. 179.

the name of a surety is not mentioned in any part of the body of a bond, but a blank intended for it is left unfilled, yet if he sign, seal and deliver it as his bond, he is bound[1]. So where the name of the surety is not mentioned in the obligatory part of a bond, but is mentioned in the recital of the condition, if he sign, seal and deliver it he is bound.[2] Where one signs a lease between the signature of the lessor and lessee, in which lease it is said that the lessee "binds himself and his security," but no name of a surety is mentioned in the lease and the lease is signed in the presence of others who sign it as witnesses, the party who signs between the signature of the lessor and lessee will be held as surety on the lease.[3] So where a lease had been signed by the lessor and lessees, and D, whose name was not mentioned in the lease, signed his name to it after the names of the lessees, adding to his name the word "surety," it was held that it sufficiently appeared that D was the surety of the lessees and that he was originally and not collaterally liable.[4] A promissory note commenced as follows: "For value received, the Fishkill Iron company promise to pay," etc. This note was signed by the president and agent of the company, their designations following their names. It was also signed by four other persons. Held, the last four signers were liable as sureties on the note, although they were not mentioned nor referred to in it. The court said it was sufficient that the instrument expressed an obligation on the part of the principal. A blank indorsement would have been sufficient to hold the surety and this was quite as effectual as a blank indorsement.[5] Where, however, the penalty of a bond is blank, it is void as to the sureties, and it cannot be held to be a covenant and thus bind them.[6]

§ 16. **When party liable on implied guaranty.**—Although a surety or guarantor generally becomes bound by express contract, yet persons are sometimes held as sureties or guarantors who do

[1] Joyner v. Cooper, 2 Bailey Law (So. Car.) 199; Valentine v. Christie, 1 Robinson (La.) 298; Potter v. The State, 23 Ind. 550; Scheid v. Leibshultz, 51 Ind. 38; Neil v. Morgan, 28 Ill. 524; Danker v. Atwood, 119 Mass. 146.

[2] Bartley v. Yates, 2 Hen. & Mun. (Va.) 398.

[3] Holden v. Tanner, 6 La. An. 74.

[4] Perkins v. Goodman, 21 Barb. (N. Y.) 218.

[5] Parks v. Brinkerhoff, 2 Hill (N. Y.) 663.

[6] Austin v. Richardson, 1 Gratt. (Va.) 310.

not so become bound. The law will, under certain circumstances, imply such contract. Thus, where two married women made a promissory note, and the payee indorsed it to A before maturity, A at that time knowing that the makers were married women, it was held that the indorsement of the note to A was an implied guaranty that the makers were competent to contract in the character in which, by the terms of the note, they purported to contract; and the fact that A, when he took the note, knew the makers were married women, did not change the rule.[1] So the vendor of a promissory note who transfers it by indorsement expressed to be without recourse, impliedly guaranties the genuineness of the signatures of the prior parties whose names appear on the note.[2] A person not a party to a promissory note, and who does not indorse it, but who sells it and receives the money, by implication guaranties the genuineness of the signatures; and this, whether he receives the money paid for the note for himself or for another. The only way he can avoid such responsibility, is by an agreement to the contrary.[3] So the purchaser of goods who transfers without indorsement, the promissory note of a third party, impliedly guaranties that the sum expressed in the note is due.[4] A person who procures notes to be discounted at a bank, impliedly guaranties the genuineness of the signatures of the makers and indorsers; and such implied contract is not a representation concerning the character, credit or ability of another, within the statute of frauds; and such person may be sued as a guarantor of the notes, if the signatures are forged.[5] The reason on which the last preceding cases are grounded is thus well expressed by the court in the case last cited: "It seems to fall under a general rule of law, that in every sale of personal property the vendor impliedly warrants that the article is, in fact, what it is described and purports to be, and that the vendor has a good title or right to transfer it." The agent of another for the sale of property, who has agreed not to sell for credit except to good and responsible parties, and to take no paper but good collectible paper,

[1] Erwin v. Downs, 15 New York, 575. To similar effect, see Ogden v. Blydenburgh, 1 Hilton (N. Y.) 182.

[2] Dumont v. Williamson, 18 Ohio St. 515.

[3] Lyons v. Miller, 6 Gratt. (Va.) 427.

[4] Jones v. Yeargain, 1 Dev. Law, (Nor. Car.) 420.

[5] Cabot Bank v. Morton, 4 Gray, 156, per Shaw, C. J.; see, also, Jones v. Ryde, 5 Taunt. 488.

and such as he is willing to guaranty, and who takes paper he knows to be worthless, and turns it over to his employer who is ignorant of its character, is liable as guarantor of such paper. He can be sued and judgment had against him without the paper being returned to him. He is not entitled to the paper till he pays the debt.[1]

§ 17. **Joint maker of note may be shown by parol to be surety.**—In view of the fact that a surety is entitled to certain rights and privileges to which the principal is not, it often becomes highly important to determine whether a party to an instrument is principal or surety, and if in fact a surety, when and where that fact may be shown. When several parties execute a joint or joint and several promissory note not under seal, and there is nothing in the note to indicate that any of them are sureties, if some of them are in fact sureties and this is known to the creditor, such sureties may both at law and in equity show by parol that they were sureties and that they were known to be such by the creditor, and they will be entitled to all the rights, privileges and immunities of sureties, and will be discharged by any act of the creditor, after he had knowledge of the fact of suretyship, which would discharge any other surety.[2] But it must appear that the

[1] Clark v. Roberts, 26 Mich. 506.

[2] Higdon v. Bailey, 26 Ga. 426; Lime Rock Bank v. Mallett, 34 Me. 547; *Id.* 42 Me. 349; Grafton Bank v. Kent, 4 New Hamp. 221; Matheson v. Jones, 30 Ga. 306; Piper v. Newcomer, 25 Iowa, 221; Cummings v. Little, 45 Me. 183; Kelley v. Gillespie, 12 Iowa, 55; Bank of St. Albans v. Smith, 30 Vt. 148; Davis v. Mikell, 1 Freeman, Ch. R. (Miss.) 548; Fraser v. McConnell, 23 Ga. 368; Corielle v. Allen, 13 Iowa, 289; Roberts v. Jenkins, 19 La. (Curry) 453; Brown v. Haggerty, 26 Ill. 469; Bradner v. Garrett, 19 La. (Curry) 455; Bruce v. Edwards, 1 Stew. (Ala.) 11; Jones v. Fleming, 15 La. An. 522; Flynn v. Mudd, 27 Ill. 323; Branch Bank at Mobile v. James, 9 Ala. 949; Kennedy v. Evans, 31 Ill. 258; Stewart v. Parker, 55 Ga. 656; Riley v. Gregg, 16 Wis. 666; Mechanics Bank v. Wright, 53 Mo. 153; McCarter v. Turner, 49 Ga. 309; Coats v. Swindle, 55 Mo. 31; Mariners' Bank v. Abbott, 28 Me. 280. In Manley v. Boycot, decided by the Queen's Bench in 1853, it was held that the defense could not be set up, unless the holder when he took the note knew of the suretyship and agreed to treat the surety as such. But in Pooley v. Harradine, 7 Ell. & Bl. 431, decided in 1857, and in Greenough v. McClelland, 2 Ell. & Ell. 424, decided in 1860 by the same court, it was held that under the statute, allowing equitable defenses to be made at law, the defense might be made at law, where the creditor knew of the fact of suretyship but did not agree to hold the surety as such. The court also held that, but for the statute the

creditor at the time the act complained of was done, knew of the fact of suretyship.[1] The great weight of authority and of reason is in favor of the law as above stated. The cause alleged against showing the fact of suretyship by parol is, that it contradicts or varies the terms of the instrument signed by the surety. The answer to this is, that such proof does not controvert the terms of the contract, but is simply proving a fact outside of, and beyond, such terms.[2] "It is a fact collateral to the contract, and no part of it."[3] "It is not to affect the terms of the contract, but to prove a collateral fact, and rebut a presumption."[4] The parties still remain bound by the same instrument and in the same manner. "Can you not prove the defendant an infant, a *feme covert*, or a bankrupt, in order to discharge him or her, and that, too, while others remain bound? Why not also prove him a surety?"[5] "The general rules of evidence are the same at law as in equity; and it is no more competent to vary the terms of a written instrument by parol evidence in equitable actions, than in those strictly legal, unless in exceptional cases, for the purpose of maintaining an action or defense under some recognized head of equitable jurisdiction. The confusion and apparent conflict in the authorities must, I think, have originated in the idea that defenses of this character were equitable in their nature, and could only be available in a court of equity. When it was conceded that they were equally available in a court of law, it is difficult to find a reason for excluding the same evidence at law that is admissible in equity. However this may be, and without invoking any equitable rule, a conclusive answer to the objection to this evidence in any court, in my opinion, is that it does not tend to alter or vary either the terms or legal effect of the written instrument. The contract was in all respects the same, whether the defendant was principal or surety. In either case, it was an absolute promise to pay $1,000 one day after date, nothing more and

defense could not have been made at law, but must have been made in equity. See, to same effect, Perley *v.* Loney, 17 Up. Can. Q. B. R. 279.

[1] Neel *v.* Harding, 2 Met. (Ky.) 247; Orvis *v.* Newell, 17 Conn. 97; Wilson *v.* Foot, 11 Met. 285; Murray *v.* Graham, 29 Iowa, 520.

[2] Valentine, J., in Rose *v.* Williams, 5 Kansas, 483.

[3] Shaw, C. J., in Carpenter *v.* King, 9 Met. 511.

[4] Shaw, C. J., in Harris *v.* Brooks, 21 Pick. 195; also Breese, J., in Ward *v.* Stout, 32 Ill. 399.

[5] Lumpkin, J., in The Bank *v.* Mumford, 6 Ga. 44.

nothing less. There is neither condition nor contingency. It would have been precisely the same contract if the defendant had added the word "surety" to his name. The addition of that word would not have varied it in the slightest degree. The only service it would have performed, would have been to give notice to the other party of the fact. If this is shown *aliunde*, it is equally effective."[1] The equity of the surety to be discharged when he is prejudiced by the act of the creditor, "does not depend upon any contract with the creditor, but upon its being inequitable in him to knowingly prejudice the rights of the surety against the principal;"[2] and it is as inequitable in the creditor to prejudice those rights when he is informed of the fact of suretyship by parol as when he is informed of it by the instrument itself. It has, however, been held by courts of high respectability, that the fact of suretyship could not, under the foregoing circumstances, be shown by parol.[3] It may be shown by parol that the maker of a promissory note was in fact an accommodation drawer for a firm who were second indorsers, and he will be entitled to the same rights as any surety.[4] A party signed a promissory note, and added the word "security" after his name. It was held that it might be shown by parol that he was the principal. The court said the addition of the word "security" is "at most the statement of a fact forming no part of the contract; and if untrue, may be shown to be so by parol as well as any other fact."[5]

[1] See the elaborate opinion of Church, C. J., in Hubbard *v.* Gurney, 64 New York, 457.

[2] Coleridge, J., in Pooley *v.* Harradine, 7 El. & Black. 431.

[3] Shriver *v.* Lovejoy, 32 Cal. 574; Bull *v.* Allen, 19 Conn. 101; Campbell *v.* Tate, 7 Lansing (N. Y,) 370; Hendrickson *v.* Hutchinson, 5 Dutcher (N. J.) 180. In Kerr *v.* Baker, Walker (Miss.) 140, and Farrington *v.* Gallaway, 10 Ohio, 543, it was held it could not be shown at law. In Stroop *v.* McKenzie, 38 Tex. 132, and in Ball *v.* Gilson, 7 Upper Can. C. P. R. 531, it was held it could not be shown unless it was also shown that the creditor agreed to hold the surety as such. The same thing was held in Yates *v.* Donaldson, 5 Md. 389. In Hartman *v.* Burlingame, 9 Cal. 557, it was held that a joint maker of a promissory note, although known by the holder to be a surety, was not entitled to notice of demand and non-payment. The same thing was held substantially in Kritzer *v.* Mills, 9 Cal. 21. See, also, on this subject Aud *v.* Magruder, 10 Cal. 282.

[4] Marsh *v.* Consolidation Bank, 48 Pa. St. 510.

[5] Rose *v.* Madden, 1 Kansas, 445. In Sisson *v.* Barrett, 2 New York, 406, a promissory note was executed by A, B and C, the principal debtor being A. The last signer of the note, C, added the word "surety" to his signature: *Held*, that without extrinsic proof, C

§ 18. **Joint maker of sealed instrument may be shown by parol to be surety.**—Where the instrument is under seal the fact of suretyship may be shown by parol at law, the same as if it was not under seal, although there is not, perhaps, quite the same unanimity in the decisions on this point as there is with reference to unsealed instruments. The same reasons which allow the fact of suretyship to be shown by parol in the case of unsealed instruments apply with equal force to the case of sealed instruments, and the uniform tendency of the later decisions is to allow a surety to make the same defenses at law as in equity. It has accordingly been held that one of the makers of a joint note under seal may, at law, show by parol that he is only a surety.[1] One of the makers of a joint and several sealed note may, at law, show by parol that he is a surety only.[2] The same thing was held with reference to a sealed note, where a statute had placed sealed and unsealed instruments on the same footing.[3] One of two or more obligors in a joint and several bond may prove by parol that he is a surety only where nothing to indicate the fact appears on the bond, and he will be entitled to give the creditor statutory notice to sue, the same as any other surety,[4] and will be discharged at law by time given the principal.[5] A gave his individual bond and a mortgage to secure the same for a sum of money borrowed by him, one half of which was for the use of, and was used by, B. Afterwards, A paid all the money and sued B at law for his share, and it was held that A might show the fact of his suretyship, although it did not appear from the bond or mortgage.[6] A lease was made to two, one of whom was sole occupant of the premises which he held over the term, and debt for the rent of the whole period of actual occupancy was brought against both. Held, that the lessee who did not occupy, might show by parol that he was only a surety, and con-

was not to be presumed to be a surety for both A and B.

[1] Rogers *v.* School Trustees, 46 Ill. 428; Smith *v.* Doak, 3 Tex. 215.

[2] Fowler *v.* Alexander, 1 Heiskell (Tenn.) 425. This case was decided in 1870. The same court, in 1836, in Deberry *v.* Adams, 9 Yerg. (Tenn.) 52, and in 1847, in Dozier *v.* Lea, 7 Humph. (Tenn.) 520, in similar cases, held that the fact could not, at law, be shown by parol.

[3] Smith *v.* Clopton, 48 Miss. 66.

[4] Creigh *v.* Hedrick, 5 West Va. 140; see, to same effect, Scott *v.* Bailey, 23 Mo. 140.

[5] Dickerson *v.* Commissioners of Ripley Co. 6 Ind. 128.

[6] Metzner *v.* Baldwin, 11 Minn. 150.

sequently not liable for the holding over.[1] On the contrary, it has been held that when the instrument is under seal, the fact of suretyship cannot, at law, be shown by parol,[2] but it may in all cases be shown in equity.[3]

§ 19. **If creditor knew of suretyship when he did the act complained of, this is sufficient to secure surety his rights.**— The fact that the holder of a negotiable instrument did not know of the suretyship of some of the parties when he took it, will make no difference in the rule before stated. If he had no knowledge of the fact when he took the instrument, but was informed of it before doing the act complained of, this will be sufficient to entitle the surety to all the rights of any surety.[4] A promissory note was signed by several parties, two of them being in fact sureties, but that not appearing from the note, the payee assigned the note to a party who did not know of the suretyship at the time of the assignment, but was afterwards informed of it, and afterwards gave time to the principal: Held, the sureties were discharged.[5] The court said: "The principle obtains for the protection of the sureties, and the holder of such notes, knowing their relation, should avoid any act to endanger their rights; and we are unable to perceive the distinction as to when the knowledge was obtained—whether before or after the purchase, so that it was known before the extension was made." In another case, depending on the same state of facts, the same thing was held. The court said: "The injury to the surety is the same as if the creditor had possessed the knowledge at the time the note was taken."[6] A financial company, by agreement with an agent, accepted bills of exchange which were discounted for the agent by a discount company, the agent guarantying payment of the bills. The discount company was not, at the time, aware of the relations between the acceptors and the agent, but was informed before the

[1] Kennebec Bank *v.* Turner, 2 Greenleaf (Me.) 42.

[2] Levy *v.* Hampton, 1 McCord Law (So. Car.) 145; Pritchard *v.* Davis, 1 Spencer (N. J.) 205; Willis *v.* Ives, 1 Sm. & Mar. (Miss.) 307.

[3] See cases last cited and Burke *v.* Cruger, 8 Tex. 66.

[4] Bank of Missouri *v.* Matson, 26 Mo. 243; Colgrove *v.* Tallman, 2 Lansing (N. Y.) 97; Pooley *v.* Harradine, 7 Ell. & Black, 431 *contra*, Bank of Upper Canada *v.* Thomas, 11 Up. Can. C. P. R. 515.

[5] Lauman *v.* Nichols, 15 Iowa, 161.

[6] Wheat *v.* Kendall, 6 New Hamp. 504. To a similar effect, see Smith *v.* Shelden, 35 Mich. 42; Wythes *v.* Labouchere, 3 De Gex & Jones, 593.

bills matured, that the agent was principal and the acceptors were sureties, and afterwards gave time to the agent: Held, the acceptors were discharged, and might come into equity, and have the bills canceled.[1] This rule is the logical and necessary result of holding that parol evidence of the creditor's knowledge of the fact of suretyship can be given at all. It is the fact of knowledge on the part of the creditor, coupled with certain equitable principles, and not any contract between him and the surety, which raises the equity on behalf of the surety, and it necessarily follows that the equity exists from the time the creditor has the knowledge.

§ 20. **Surety must show that creditor knew of suretyship—What is sufficient evidence of the fact.**—When a surety sets up claims depending on that relation and the fact of suretyship does not appear from the instrument signed by him, he must, in order to sustain such claims, prove that the creditor knew of the suretyship.[2] Where a promissory note was held by the payee and the note did not show the fact of suretyship, but it was proved that one of the makers was only a surety, the court held that it would be presumed that the creditor knew of the suretyship.[3] Where several persons execute a promissory note and there is nothing on its face to show their relations to each other, there is no presumption from the order in which they sign that any, or which of the signers, are sureties.[4] Where three parties signed a bond and it did not appear from the face of the bond, who, if any one, was surety, the circumstances of one obligor making payments, and being resorted to by the creditor, raises a strong presumption that he was the principal; while the circumstances of another obligor not making payments and not being called upon for them, raises a presumption that he was only surety.[5] A

[1] Oriental Financial Corporation *v.* Overend, Law Rep. 7 Chancery Appl. Cas. 142. This decision was affirmed by the House of Lords on appeal, in 1874, and is the settled law of England. Liquidators of Overend, Gurney & Co. *v.* Liquidators of Oriental Financial Corporation, Law Rep. 7 Eng. & Irish Appl. Cas. 348.

[2] Wilson *v.* Foot, 11 Met. 285.

[3] Ward *v.* Stout, 32 Ill. 399. In Cummings *v.* Little, 45 Me. 183, it was held that whenever one having no interest in a note, becomes a party to it at the request and for the accommodation of another, the relation of principal and surety exists, and the original holder, between whom and the principal the consideration passed, is presumed to have knowledge of the fact.

[4] Paul *v.* Berry, 78 Ill. 158; Summerhill *v.* Tapp, 52 Ala. 227.

[5] Doughty *v.* Bacot, 2 Desaussure, Eq., (So. Car.) 546.

promissory note, some of the makers of which were in fact sureties, though nothing to indicate the suretyship appeared on the note, was transferred to A after it was overdue and discredited. A, without any actual notice of the suretyship, gave time to the principal: Held, the fact that the note was overdue, was not notice to A of the fact of suretyship, and that the sureties were not discharged.[1] The court said: "He who takes a discredited note is presumed to be acquainted with every defense to which it is subject. But whether some of those whose names are upon a note are sureties, is a matter wholly immaterial to the person who purchased the note, and he cannot be presumed to have inquired or to have learnt in what character they signed, because that was a circumstance with which he had no concern."

§ 21. **Property pledged by one for debt of another, occupies position of surety.**—When property of any kind is mortgaged or pledged by the owner to answer for the debt, default or miscarriage of another person, such property occupies the position of a surety or guarantor, and anything which would discharge an individual surety or guarantor who was personally liable, will, under similar circumstances, discharge such property.[2] This rule is applicable to every variety of circumstances. A being indebted to B, and C being indebted to A, they get together and agree that B shall surrender up A's note and take C's in its place, A at the same time canceling his claim against C for the same amount, and it is done accordingly. C gives B a mortgage to secure his note thus given on a piece of his property; A also gives B a mortgage on some of his property to secure the same note of C: Held, that by this transaction A's property became the surety of C, and was discharged by the giving of time to C.[3] A material man took the note of the contractor for the materials furnished for a building, and extended the time of payment. The owner having no notice of the claim, paid the contractor in full, before the note fell due: Held, the building occupied the position of surety for

[1] Nichols *v.* Parsons, 6 New Hamp. 30.

[2] Robinson *v.* Gee, 1 Vesey Sr. 251; Royal Canadian Bank *v.* Payne, 19 Grant's Ch. R., 180; Christiner *v.* Brown, 16 Iowa, 130; Denison *v.* Gibson, 24 Mich. 187; Joseph *v.* Heaton, 5 Grant's Ch. R., 636; Ryan *v.* Shawneetown, 14 Ill. 20; Lord Harberton *v.* Bennett, Beatty (Ir. Ch.) 386; Rowan *v.* Sharp's Rifle Co., 33 Conn. 1; Union Bank *v.* Govan, 10 Smedes & Mar., (Miss.) 333; Bowker *v.* Bull, 1 Simons, (N. S.) 29; White *v.* Ault, 19 Ga. 551.

[3] White *v.* Ault, 19 Ga. 551.

the contractor, and that the agreement to give time discharged the building from the lien.[1] When a wife mortgages her real estate for the debt of a firm of which her husband is a member, such real estate occupies the position of a surety, and if it becomes released at law, equity will not charge it.[2] A held a judgment against B, which was a lien upon two tracts of B's land. B sold one tract to C, the other tract being sufficient to pay the debt. D with a knowledge of the sale of the one tract to C, procured a release from A of the other tract, and then bought it of B; and also bought A's judgment against B; Held, C's land was discharged from the lien of the judgment. After the sale of the tract to C, the creditors of B were bound to resort to B's other land before coming on that sold to C. It occupied the position of a surety, and the surety's right to subrogation being destroyed, it was discharged.[3] On the same principle, where a mortgagor sells a portion of the mortgaged premises, and in the deed of conveyance expresses that the same is "subject to the payment by the said grantee of all existing liens upon said premises," the effect of this charge is to make the part of the premises so conveyed the principal debtor for a proportionate part of the mortgage debt, and the mortgagor a surety only.[4] So where land subject to a judgment, was sold for its full value by the judgment debtor to a third person, it was held that the land occupied the position of a surety, and was discharged by the creditor releasing subsequently acquired securities for the debt.[5]

§ 22. **Property of wife pledged for debt of husband, occupies position of surety.**—While a married woman cannot usually become personally bound for the debt of her husband, she may ordinarily pledge or mortgage her separate property for his debt, and if she does so, such property occupies the position of a surety or guarantor, and will be discharged by anything that would discharge a surety or guarantor who was personally liable.[6]

[1] Hill v. Witmer, 2 Philadelphia, (Pa.) 72.

[2] Leffingwell v. Freyer, 21 Wis. 392.

[3] Lowry v. McKinney, 68 Pa. St., 294.

[4] Hoy v. Bramhall, 4 C. E. Green, (N. J.) 563.

[5] Barnes v. Mott, 64 New York, 397.

[6] Johns v. Reardon, 11 Md. 465; Denison v. Gibson, 24 Mich. 187; Agnew v. Merritt, 10 Minn. 308; Wallace v. Hudson, 37 Tex. 456; Wolf v. Banning, 3 Minn. 202; Spear v. Ward, 20 Cal. 659; Niemcewicz v. Gahn, 3 Paige, 614; Stamford, &c., Banking Co v. Ball, 4 De. Gex., Fih. and J., 310, Gahn v. Niemcewicz, 11 Wend. 312; Knight v. Whitehead, 26 Miss., 245;

Where a married woman mortgages her separate real estate for the debt of her husband, she will, after his death, be entitled to have her estate exonerated out of his assets. "In such case the wife is regarded as a surety."[1] Where a married woman pledged her property to indemnify the surety of her husband, the property thus pledged was treated in all respects as a surety.[2] Where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety.[3] Where the fact of suretyship does not appear from the mortgage, the wife must show that the creditor knew of the suretyship in order to entitle the property to stand in the position of a surety. But the fact of suretyship may be proved by parol.[4] Where a mortgage made by husband and wife, of the wife's property for the husband's debt, recited that it was made in consideration of $6,000 to the mortgagors, and "each of them" paid, it was held the wife might show by parol that the debt was that of the husband, and thus avail herself of the rights of a surety with reference to the property.[5] Where the title to the wife's property mortgaged for her husband's debt is recorded, such record will be sufficient notice to the creditor of the fact of suretyship.[6] When a husband borrows money and secures it by mortgage on his wife's lands which she executes with him, and he lays out the money in permanent buildings and improvements on such lands, the lands do not occupy the position of a surety. The debt is, in reality, that of the wife.[7] A wife who joins with her husband in a mortgage of his real estate for the payment of his debt, does not, as to such estate, occupy the position of a surety.[8] A husband mortgaged his real estate to secure his debt, and his wife joined in the mortgage, and waived

Vartie v. Underwood, 18 Barb (N. Y.) 561; Smith v. Townsend, 25 New York, 479; Bank of Albion v. Burns, 46 New York, 170; Coats v. McKee, 26 Ind. 223; Wilcox v. Todd, 64 Mo. 388; Purvis v. Cartsaphan, 73 Nor. Car. 575.

[1] Knight v. Whitehead, 26 Miss. 245.

[2] Hodgson v. Hodgson, 2 Keen, 704.

[3] Wheelwright v. De Peyster, 4 Edwards' Ch. R. 232; Loomer v. Wheelwright, 3 Sanford's Ch. R. 135.

[4] Gahn v. Niemcewicz, 11 Wend. 312; Niemcewicz v. Gahn, 3 Paige, 614.

[5] Spear v. Ward, 20 Cal. 659.

[6] Bank of Albion v. Burns, 46 New York, 170; Smith v. Townsend, 25 New York, 479.

[7] Dickinson v. Codwise, 1 Sandford's Ch. R. 214.

[8] Hawley v. Bradford, 9 Paige, 200. But see Dawson v. Bank of Whitehaven, Law Rep. 4, Ch. Div. 639.

her homestead rights. It was held she did not with reference to such homestead rights, occupy the position of a surety, and could not take advantage of time given the husband.[1] The court admitted that if the separate estate had been mortgaged, she would have been entitled to the rights of a surety, but said of a homestead, "if it is an estate, it is such an estate as has never been defined by law, an estate unknown to the common law, technically, no estate at all."

§ 23. **When retiring member of firm becomes surety of other partners for firm debts.**—When one member of a partnership retires from the firm, and the remaining members agree with him to pay the firm debts, and these facts are known to the creditor, the member so retiring will be considered, in law, a surety.[2] A and B being partners and indebted, A died. B then formed a partnership with D, and B and D agreed to pay the debts of the old firm. The creditor knew of this, and gave time of payment to B and D for three years, for the debt of the old firm. Held, the estate of A occupied the position of a surety, and was discharged.[3] If a retiring member of a firm agrees to bear a portion of the loss upon a note taken by the other partners towards their distributive share of the partnership effects, provided the note cannot be collected from the maker, he occupies the position of surety for the maker *pro tanto*, and will be discharged if the holders of the note give time to the maker.[4] A and B were partners, and indebted to C; A sold his interest in the partnership to B, who covenanted to pay all the partnership debts, and this was known to C. Afterwards B made an arrangement under the bankruptcy acts with his creditors, including C, by which C agreed to take a less amount for the partnership debt, and to extend the time. Held, A occupied the position of a surety, and was discharged both by the giving of time and by the novation

[1] Jenness *v.* Cutler, 12 Kansas, 500.

[2] Thurber *v.* Corbin, 51 Barb. (N.Y.) 215; Colgrove *v.* Tallman, 2 Lansing, (N.Y.) 97. But where under such circumstances the creditor took from the remaining member his note for the firm debt, upon the agreement that if paid it should cancel the debt, but if not he should hold the firm for it, and the note was not paid, it was held the retiring member was not discharged; Varnam *v.* Harris, 1 Hun. (N.Y.), 451.

[3] This was decided by the House of Lords, in Oakeley *v.* Pasheller, 10 Bligh, (N. S.) 548. To same effect, see Smith *v.* Shelden, 35 Mich. 42. See also, Colgrove *v.* Tallman, 67 New York, 95.

[4] Wilde *v.* Jenkins, 4 Paige, 481.

of the debt.[1] Where a member of a firm transferred his interest therein to a third person, who was received into the firm, and assumed all the liabilities of the retiring member, it was held that such retiring member occupied the position of a surety for the firm debts to the extent that the assets of the firm were sufficient for their payment.[2] A and B were partners, and dissolved their partnership, B taking the business, and agreeing to pay the firm debts. Afterwards, judgment for a firm debt was recovered against A and B, which A was obliged to pay, and by agreement with the creditor, A sued out execution on the judgment against the land of B. Held, that as between themselves, A was the surety of B, and had a right to make the agreement with the creditor, and could hold the land against subsequent creditors of B.[3] Three persons were in partnership in mercantile business. Two sold out to the third, who agreed to pay the partnership debts. The partner thus assuming the firm debts, remained in possession of the former property of the firm, and was from time to time, for eight months, selling out the goods, when the firm debts having become due, and not being paid, one of the retiring partners was sued for such firm debts, and thereupon filed a bill to compel the partner who assumed the debts to pay them from the property which had belonged to the partnership. Held, he occupied the position of a surety, and was entitled to the relief; a surety having a right to come into equity to compel the principal to pay the debt.[4]

§ 24. **Vendor of land who sells it subject to mortgage, is surety for mortgage debt.**—If a party owning land, encumbered by mortgage to secure his debt, sells it, and the vendee, as part of the purchase price, agrees to pay the mortgage debt, the vendor, as between themselves at least, becomes the surety of the vendee for the mortgage debt, and the vendee becomes the principal, and the vendor will, as to such debt, be entitled to the same rights and remedies against the vendee that any surety has against his principal.[5] Whether the vendor in such case would be entitled to all the rights of a surety as against the creditor, who had knowledge of the facts, is not quite so clear upon authority. A

[1] Wilson *v.* Lloyd, Law Rep. 16 Eq. Cas. 60.

[2] Morss *v.*. Gleason, 64 New York, 204.

[3] Waddington *v.* Vredenbergh, 2 Johns. Cas. 227.

[4] West *v.* Chasten, 12 Fla. 315.

[5] Mills *v.* Watson, 1 Sweeny, (N.Y.) 374; Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Marsh *v.* Pike, 1 Sandford's Ch. R. 210.

and B purchased land jointly, and gave back a joint bond and mortgage for the purchase money: A afterwards conveyed his half interest to B, and B agreed to pay the mortgage and gave A a bond of indemnity against the mortgage: Held, A occupied the position of a surety and was entitled to the same rights of subrogation to which any surety would have been entitled, notwithstanding the bond of indemnity.[1] Under a similar state of facts of which the creditor had notice, (except that no bond of indemnity was given the vendor,) it was held that the vendor was not discharged because the creditor released the mortgage on a portion of the land. This was placed upon the ground that while as between themselves, the vendor was the surety of the vendee, yet the vendor did not occupy that relation as to the creditor, and was not entitled to the rights of a surety as against the creditor, unless the creditor, for a valuable consideration, agreed to accept him as a surety.[2] Where the owner of land incumbered by mortgage executed by him, sold it subject to the incumbrance, it was held that in equity the land became the primary fund for the payment of the debt, that the vendor occupied the position of a surety, and upon payment of the mortgage debt was entitled to be subrogated to the rights of the creditor the same as any other surety.[3] Under a similar state of facts it was held that the vendor was a surety, and was discharged by time given the vendee by the creditor, even though it was expressly agreed between the vendee and creditor that the mortgage and the debt should remain in all other respects unaffected by the giving of time.[4] As the rights of the surety against the creditor do not depend upon contract between them, but are founded upon equitable principles; and as it is settled that if the creditor does

[1] Cherry v. Monro, 2 Barb Ch. R. 618. The same principle was held in succession of Daigle, 15 La. An. 594.

[2] James v. Day, 37 Iowa, 164. The same principle was held in Marsh v. Pike, 1 Sandford's Ch. R. 210, and the court, on a bill filed by the vendor, refused to compel the creditor to collect the money from the mortgaged premises, but granted relief against the vendee as a principal.

[3] Johnson v. Zink, 51 New York, 333.

[4] Calvo v. Davies, 8 Hun. (N.Y.) 222. In Penfield v. Goodrich, 10 Hun. (N. Y.) 41, and Meyer v. Lathrop, 10 Hun. (N. Y.) 66, it was held that the vendor of land which he conveyed subject to a mortgage, was not discharged by the creditor giving time to the vendee for payment of the mortgage debt. But it was admitted that the land was the primary fund for the payment of the debt, and that as between themselves the vendor was the surety of the vendee.

not know of the suretyship when he takes the obligation of the surety, but is informed of it afterwards, the rights of the surety then arise; these principles seem to apply with full force to the point under consideration, and it seems clear on principle, that the vendor in such cases as the foregoing, is entitled as against the creditor, to all the rights of any surety.

§ 25. **Joint obligors are sureties for each other—When sole maker of note or bond is surety, etc.**—Where several persons purchase land, it being understood between them that each shall have an equal share of it, and they all join in a bond for the purchase money, they are sureties for each other; and if one fails to pay any portion of his share, and the others pay it, the one failing to pay will have no interest in the land, which he or his creditors can reach, till his share is paid up.[1] In a similar case, where one of two joint purchasers paid more than his share, it was held that he was surety for the excess, and entitled to set up the bond as a specialty debt against the estate of his co-purchaser.[2] Each principal obligor in a joint bond is, as between them, a surety for his co-obligor.[3] Where two administrators and two sureties executed a joint and several administration bond, it was held that each of the administrators was surety for the other, and if one committed a devastavit, the other was chargeable *pari passu* with the other sureties, but was not liable as principal.[4] When a promissory note is executed by two persons, the consideration going one-half to each of them, as between themselves, they are each principal for one-half the debt, and surety of the other for the other half.[5] The sole maker of a promissory note is sometimes entitled to stand in the position of a surety. Thus W, who was absent, wrote to N, requesting him to borrow of M a sum of money to pay a debt of W, promising in the letter to repay the money on his return. This letter was shown to M, and the money was obtained, for which N. gave his individual note. W, on his return, went to M with the money, and offered to pay N's note

[1] Deitzler *v.* Mishler, 37 Pa. St. 82.

[2] Stokes *v.* Hodges, 11 Rich. Eq. (So. Car.) 135; to the same effect see Crafts *v.* Mott, 4 New York, 604.

[3] Hatch *v.* Norris, 36 Me. 419; for special case on same subject see Cox *v.* Thomas' Admx. 9 Gratt, (Va.) 312.

[4] Morrow's Admr. *v.* Peyton's Admr. 8 Leigh, (Va.) 54.

[5] Hall *v.* Hall, 34 Ind. 314; holding that a court of equity will look at all the circumstances of a case to determine whether or not a party is a surety; see Eyre *v.* Hollier, Lloyd & Goold, (Temp. Plunket) 250.

but M permitted W to retain the money, and agreed to wait for it: Held, N was a surety, and was discharged.[1] A agreed to take B's notes for a certain debt about to be created, and also certain railroad shares as collateral security for the notes, provided B would furnish him the bond of responsible parties conditioned that they would take the shares and notes at the end of two years and pay what should remain due on the notes. Held, that although such parties did not sign the notes, they were in fact sureties of B, and not original promisors, and that they were entitled to all the rights of sureties.[2] If a purchaser of goods, subsequent to the sale, gives a portion of them to A, and A unites with the purchaser in a joint note for the purchase money, with the understanding that A signs as surety only, the fact that A received a part of the goods from the purchaser as a gift, does not make him a principal in the note.[3]

§ 26. **Stockholders of a corporation, liable for its debts, are not its sureties—When surety becomes principal, etc.**—Where the charter of a corporation made the stockholders "jointly and severally, personally liable for the payment of all debts or demands contracted by the said corporation," it was held the stockholders were principal debtors in their individual, as well as their corporate capacity, and were not sureties of the corporation, nor discharged by time given to it.[4] When two parties, for mutual accommodation, loan their notes to each other, neither thereby becomes a surety for the other. A loaned two of his individual notes to B, which B discounted, and A had to pay. At the same time as the former loan, B loaned two of his individual notes for the same amount, and due at the same time, to A. After paying the notes, A claimed certain rights of subrogation as the surety of B in the two notes which he had paid: Held, he was not a surety, and was not entitled to the subrogation.[5] A surety may, by subsequent dealings between himself and the creditor, become a principal. A surety on a note given for the price of a negro, gave his own note for a balance remaining due on the original note, in discharge of such balance: Held, that by this transaction the surety ceased to be the surety of his principal, and became his

[1] McQuesten *v.* Noyes, 6 New Hamp. 19.

[2] Watriss *v.* Pierce, 32 New Hamp. 560.

[3] Fraser *v.* McConnell, 23 Ga. 368.

[4] Harger *v.* McCullough, 2 Denio, 119. To same effect, see Moss *v.* McCullough, 7 Barb. (N. Y.) 279.

[5] Stickney *v.* Mohler, 19 Md. 490.

creditor, and that he could not make the defense to the last note that the negro was unsound, and the consideration of the first note had failed.[1] Judgment having been obtained against a surety, he entered into a new arrangement with the creditor, irrespective of the principal, by which execution was not to issue while he kept up certain policies on his life for securing the debt, and the creditor was to take a less amount than the judgment. It was held that by this arrangement the surety became a principal, and was no longer entitled to any of the rights of a surety.[2]

§ 27. **Surety entitled to same rights after judgment against him as before.**—The relation of principal and surety continues after judgment against the surety, and a surety is, both at law and in equity, entitled to the same rights, and will be discharged by the same act of the creditor after, as before, judgment.[3] It has in a few cases been held that the character of the surety as such became merged in the judgment, and that thenceforth he became a principal and was not entitled to the rights of a surety.[4] There is, however, very little conflict of au-

[1] Fluker v. Henry's Adm'r, 27 Ala. 403.

[2] Reade v. Lowndes, 23 Beavan, 361. To the effect that a surety does not become a principal by joining in a new obligation after his liability is fixed, see Merriken v. Godwin, 2 Delaware Ch. R. 236.

[3] Commercial Bank v. Western Reserve Bank, 11 Ohio, 444; Brown v. Ayer, 24 Ga. 288; Commonwealth v. Miller's Admrs. 8 Serg. and Rawle, 452; Moss v. Pettengill, 3 Minn. 217; Chambers v. Cochran, 18 Iowa, 159; Rice v. Morton, 19 Mo. 263; Bangs v. Strong, 7 Hill, (N. Y.) 250; Smith v. Rice, 27 Mo. 505; Davis v. Mikell, 1 Freeman's Ch. R. (Miss.) 548; Newell v. Hamer, 4 How. (Miss.) 684; Curan v. Colbert, 3 Kelly, (Ga.) 239; Brown v. Exrs. of Riggins, 3 Kelly, (Ga.) 405; Delaplaine v. Hitchcock. 4 Edward's Ch. 321; Allison v. Thomas, 29 La. An. 732.

[4] McNutt v. Wilcox, 1 Freeman's Ch. R. (Miss.) 116. In Bay v. Tallmadge, 5 John's Ch. 305, Chancellor Kent held that after judgment against bail in a civil case, the relation of principal and surety ceased, and the bail was not discharged by time given. The same principle was held in LaFarge v. Herter, 3 Denio, 157, but the decided weight of New York authority is the other way. In Findlay's Exrs. v. United States, 2 McLean, 44, it was held that judgment against the accommodation drawer of a bill of exchange merged the relation of principal and surety, and that thereafter the only right of the surety was to pay and have subrogation. In Marshall v. Aiken, 25 Vt. 328; McDowell v. Bank, 1 Harrington, (Del.) 369, and Dunham v. Downer, 31 Vt. 249, it was held that the judgment merged the relation of principal and surety, so that at law the surety no longer had any rights as such, but that in equity all his rights remained. In Jenkins v. Robertson, 2 Drewry, 351, A as principal and B as surety, were indebted to C. B died, and C, in a creditor's suit obtained a decree

thority on this subject. There is no good reason why a surety should not be entitled to the same rights after, as before, judgment. "The recovery of a judgment against the surety does not merge or destroy his character as such, or the relation which he sustains to his principal. Its only effect is to change the form of the security as between him and the debtor. Merging the contract between the creditor and the principal debtor or surety, cannot affect the relation between the principal and surety. This relation is not necessarily created by the contract to which the creditor is a party, but may be created even without his knowledge."[1] "The judgment is technically a security of a higher nature, but it is a security for the same debt or duty as the contract on which it is founded."[2] "To give time, or to discharge the principal after judgment, would be as injurious to the surety as before judgment. In either case the injury is the same, and why not have the same protection?"[3] In another case the court said: "Had the facts now proved, occurred before this judgment was rendered, they would have opposed a good defense to the recovery of it; and if not availed of in defense, the judgment would have concluded them; occurring after the judgment, they are no more concluded by it than payment, or a release, or any other matter going to discharge it."[4] After joint judgment against principal and surety, the surety will be discharged by time given the principal,[5] by creditor releasing levy on property of principal, and taking from principal bond and mortgage in payment for the debt,[6] by creditor releasing principal, who is taken in execution, and taking from him a fresh security for the debt.[7] The same rule prevails where separate judgments are recovered against the principal and surety.[8]

against his estate. Afterwards C sued A and took judgment, thereby giving time: Held, the estate of B was not discharged. Its character as surety was merged in the decree, and all that followed was simply an execution of the decree. See, also, on this subject, Dougherty v. Richardson, 20 Ind. 412.

[1] Bangs v. Strong, 4 New York, 315, per Pratt, J.

[2] Carpenter v. King, 9 Met. 511, per Shaw, C. J.

[3] Trotter v. Strong, 63 Ill. 272, per Walker, J.

[4] Shelton v. Hurd, 7 Rhode Is. 403, per Ames, C. J.

[5] Storms v. Thorn, 3 Barb. (N. Y.) 314; Blazer v. Bundy, 15 Ohio St. 57; McCrary v. Coley, Georgia Decisions, 104; Carpenter v. Devon, 6 Ala. 718; Crawford v. Gaulden, 33 Ga. 173.

[6] La Farge v. Herter, 11 Barb. (N. Y.) 159.

[7] Eales v. Fraser, 6 Man. & Gr. 755.

[8] Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania, 7 Watts & Serg. 335.

§ 28. **Surety, who in terms binds himself as principal, not entitled to rights of surety.**—Where a surety binds himself in terms as a principal in the obligation which he signs, he will be held as a principal, and will be entitled to none of the rights of a surety. "There is no rule of law which prohibits a surety from waiving the right which belongs to him as such. Such a waiver has nothing in itself offensive to the policy of the law." The express terms of the obligation, in such case, excludes the idea of suretyship, and the creditor has a right to avail himself of the contract his vigilance has obtained.[1] Where three parties signed a joint and several note, the first one adding to his name the word "principal," the other two adding the word "sureties," it was held the one to whose name the word "principal" was attached could not show by parol that he was in fact a surety, and known to be such by the creditor. The court said that if the note had been silent as to who was principal and who surety, the suretyship might have been shown without contradicting the note, but in the present case, to allow the proof would be to contradict the terms of the note.[2] Several parties signed a note to a bank commencing as follows: "We, severally and jointly, all as principals, promise to pay," and it was held none of them could show they were sureties.[3] The court said: "Here is an express contract that each signer is a principal. Each contracts for himself with the holder that he is a principal; that he will so stand upon the note. This constitutes a part of the contract with the bank as much as the sum to be paid or the time of payment or the promise to pay anything at any time does, and this fact as to the capacity in which the signer of the note binds himself, may often be as important a part of the contract as any other." A principal and several sureties signed a bond, reciting that they all signed "as principals," and nothing appeared on the face of the bond to indicate that any of them were sureties: Held, the sureties were estopped by the bond to show they were sureties, and that they were not discharged by time given.[4] Where a note

[1] Picot v. Signiago, 22 Mo. 587; McMillan v. Parkell, 64 Mo. 286.

[2] Waterville Bank v. Redington 52 Me. 466.

[3] Derry Bank v. Baldwin, 41 New Hamp. 434. This decision was made at law, and one of the parties filed a bill in equity, claiming relief as a surety there, but it was denied him, and the court held that both at law and in equity, he was concluded by the terms of his obligation. Heath v. Derry Bank, 44 New Hamp. 174.

[4] Sprigg v. Bank of Mount Pleasant, 10 Peters, (U. S.) 257.

commenced, "We each as principal, jointly and severally promise to pay," but one of the signers was a surety, and known to the creditor to be such, and time was given to the principal, which would ordinarily have discharged a surety, it was held the surety was not discharged.[1] But where, in such a case, the surety added to his signature the word "surety," it was held that he had all the rights of a surety, and was discharged by time given.[2] A surety may also be estopped by his conduct from claiming the rights of a surety. A appeared on a note as principal, and B as surety, and in various litigations concerning it for eight years, A professed to be the principal. In the mean time judgments had been recovered against B, by certain of his creditors. In a contest between A and such creditors, it was held that A could not show, to the prejudice of the creditors, that he was, in fact, surety and B principal on such note.[3]

§ 29. **Surety estopped to deny recitals of his obligation.**— The general rule is that sureties are estopped to deny the facts recited in the obligations signed by them, and this, whether the recitals are true or false in fact. Having once solemnly alleged the existence of the facts, they cannot afterwards be heard to deny it.[4] The plaintiff in a replevin suit, as a condition for a continuance granted him, was required to give an additional bond, and in pursuance of such requirement, A, long after it had been taken in the case, signed the original replevin bond to the sheriff, which had been signed by other sureties. In a suit against A on the bond, he set up the defense that the sheriff had no right to take a replevin bond in the suit at the time he, A, signed it, and that the bond was void. The bond on its face imported that it was executed when the suit was instituted, and when the sheriff had a right to take it, and it was held that the surety was estopped to deny that it was taken at that time.[5] In an action against the sureties in an undertaking purporting to have been given to procure the discharge of an attachment, they will not be allowed to

[1] Claremont Bank *v.* Wood, 10 Vt. 582.

[2] People's Bank *v.* Pearsons, 30 Vt. 711.

[3] Goswiller's Estate, 3 Penn. & Watts, 200.

[4] Monteith *v.* Commonwealth, 15 Gratt. (Va.) 172; Duhamp *v.* Nicholson, 14 Martin, (La.) 2 N. S. 672; Cordle *v.* Burch, 10 Gratt. (Va.) 480; Borden *v.* Houston, 2 Tex. 594; Cecil *v.* Early, 10 Gratt. (Va.) 198; Cox *v.* Thomas' Admx., 9 Gratt. (Va.) 312; Lee *v.* Clark, 1 Hill, (N.Y.) 56; State *v.* Lewis, 73 Nor. Car. 138.

[5] Decker *v.* Judson, 16 New York, 439.

show as a defense that no attachment was in fact issued. It is not essential to the validity of such an undertaking that an attachment shall actually be issued. Giving an undertaking which recites the issuance of an attachment when none has been issued, is conclusive evidence of a waiver of the issuance of the attachment.[1] The surety on a receiver's recognizance, which recites that it has been duly acknowledged before a commissioner of the court, is estopped to deny that fact.[2] When the bond of a city treasurer recited the fact that he had been elected to that office, and the sureties on the bond were sued for money received by him while acting in that capacity, it was held that they could not deny that he had been elected. The court said, that by signing the bond they had enabled him to get the money of the city, and it was too late for them to deny his election.[3] When the bond of a borough collector recited that he was duly elected, it was held that the sureties therein could not show that the office had been abolished before his election.[4] Where the condition of a bond recited that A was guardian, etc., it was held that neither A nor the sureties on his bond could deny that he was guardian, nor set up as a defense any supposed irregularity in obtaining the appointment.[5]

§ 30. **Surety estopped to deny recitals of his obligation.**—In an action against C as surety for S, in a replevin bond conditioned for the re-delivery of property attached to abide the final order of the court, he pleaded that at the time of, and prior to the institution of the original suit by attachment, S, the defendant therein, and the principal in the replevin bond, was dead. It was held, that by signing the bond which purported to be signed by S as a co-obligor, C was estopped to deny that S had signed it.[6] The official bond of an executor was made payable to four justices, one of whom was not a member of the court at the time: Held, that the surety, having executed the bond, was estopped to deny that any of those named in the bond as justices were such.[7] So where the bond of a guardian recites that the principal has been appointed guardian, the sureties therein are estopped to

[1] Coleman v. Bean, 1 Abbott's Rep. Omitted Cas. (N.Y.) 394.

[2] Driscoll v. Blake, 9 Irish Ch. R. 356.

[3] City of Paducah v. Cully, 9 Bush, (Ky.) 323; to same effect, see People v. Jenkins, 17 Cal. 500

[4] Seiple v. Borough of Elizabeth, 3 Dutcher, (N. J.) 407.

[5] Fridge v. The State, 3 Gill & Johns. (Md.) 103.

[6] Collins v. Mitchell, 5 Fla. 364.

[7] Franklin's Admr. v. Depriest, 13 Gratt, (Va.) 257.

deny the jurisdiction of the court making the appointment.[1] The sureties on the bond of an Indian agent, which recites his appointment as such, are estopped to deny that fact.[2] The bond given by a coroner upon assuming the duties of sheriff, recited that the sheriff was dead, and that thereby the coroner had become sheriff, and it was held that the sureties on the bond were estopped to deny those facts.[3] A guaranty purported to have been made in consideration of one dollar, but the actual consideration was that moving between principal and creditor. The guarantor attempted to prove that the one dollar had not been paid: Held, the parties in such a case are taken to have agreed that the actual consideration shall be estimated in money, at the sum expressed as a consideration in the contract, and where the parties have agreed that a legal consideration shall assume such a form, for the purposes of the contract, they are estopped from denying, in an action on the contract, that it was such in fact.[4] But where a contract for the delivery of sheep recited that $1,000 had been paid by the purchaser, and it was signed by the seller and certain sureties for him, in a suit on the contract it was held that the fact of the payment of the money might be contradicted. The court said: "We are of opinion, as it was stated to be a part of the consideration for the execution of said writing, that the writing is not conclusive upon the subject. The truth may be inquired into."[5]

§ 31. **Surety estopped to deny recitals of his obligation—Reason why—When not estopped.**—The holder of the bond of a corporation guarantied it as follows: "I hereby guaranty the due payment of the money secured thereby." In a suit against him on the guaranty, the guarantor offered to show that the bond was invalid, and the corporation had no authority to make it; but it was held that he was estopped to show those facts. The court said: "The guaranty of the payment of the bond by the defendant imports an agreement or undertaking that the makers of the bond were competent to contract in the manner they have, and that the instrument is a binding obligation upon the makers."[6] In an action of covenant on a sealed guaranty of a lease, it was

[1] Norton v. Miller, 25 Ark. 108.

[2] Bruce v. United States, 17 How. (U. S.) 437.

[3] Allbee v. The People, 22 Ill. 533.

[4] Redfield v. Haight, 27 Conn. 31.

[5] Swope v. Forney, 17 Ind. 385.

[6] Remsen v. Graves, 41 New York, 471, per Mason, J.

objected that there was no proof that one of the lessors executed the lease, but it was held that the guarantors were estopped from denying the execution of the lease by the lessees. The court said: "Entering into this guaranty was an acknowledgment by the guarantors that the lease was duly executed by both lessees."[1] In the cases already referred to on this subject, the question came up in a suit against the surety, on the obligation signed by him. The facts recited were, in most instances, within the knowledge of the surety, and the principal had usually acted in the capacity which the obligation recited he occupied, and derived a benefit therefrom, and become a defaulter therein. In such cases the issue is not the right of the principal to fill the position, but his right to retain money received by him while filling the same, and which belongs to others. To such cases the principles of equitable estoppel, as well as the rule that a man cannot aver against his own deed, apply. When the issue is as to the right of the principal to fill the position, different principles will apply. A person was appointed to fill an office created by a city, and gave an official bond with sureties, which recited that he had been appointed collector of assessments for street improvements, and was conditioned that he should pay the city treasurer all moneys which he might receive as such collector. The city had, in fact, no authority to create the office, but the court held the sureties were estopped to deny that the collector was an officer *de facto*.[2] The distinction above referred to was noticed by the court as follows: "The action is not to enforce upon him the execution of the duties of his office, or to recover damages for his failure to perform them. In such a case both he and his sureties might answer and say, perhaps successfully, there was no such office, and he was without legal power. But here the suit is founded upon an actual, complete execution of the duties of the office he claims to fill. He is *functus officio*, as collector of taxes. The money he has is the money of the city, which he has no right to retain, and which his sureties on the whole case, just as it is, have stipulated that he shall pay over to the city treasury."

§ 32. **When surety not estopped by recitals of obligation signed by him.**—A surety is not in all cases estopped to deny the facts recited in the obligation signed by him. Thus, where

[1] Otto v. Jackson, 35 Ill. 349.

[2] Hoboken v. Harrison, 1 Vroom. (N. J.) 73.

the bond of a township recited that the township officers executing the same, had been authorized, as the law required, to issue such bond, in a suit on the bond it was held the township might show that no such authority had been given. The court said that the doctrine that a party is estopped from contradicting the recitals of his own deed, is applicable only where the deed is admitted to be the act of such party.[1] A court had appointed a guardian for a minor, and while such appointment was unrevoked, appointed another who gave a bond with surety, reciting that he had been appointed guardian. In a suit on this bond against the surety, it was held that the appointment of the last guardian was absolutely void, and that the surety might show the fact.[2] The court said: "It is certainly true that where a party makes a distinct and clear recital of any fact in a deed or other valid obligation, he will be estopped from denying the truth of such recital. But this doctrine pre-supposes a valid legal obligation, and we do not know any authority, and reason is certainly against the proposition, that a party is estopped, by any recital contained in an instrument, from showing that the instrument containing it is absolutely null and void." An appeal bond was conditioned for the prosecution of an appeal from the judgment of a justice of the peace to the Anne Arundel County Court. There was, in fact, no such court. Held, the sureties were not estopped to deny the existence of the court by the recital in the bond.[3] The court said: "Whether a court exists or not, is something more than a mere question of fact, as to which parties may agree or be concluded by admissions. It must depend on the constitution or laws, and when the court can see that the supposed tribunal is not known to these it must so decide, no matter what the parties may have admitted by estoppel or agreement." A defendant was taken under a bail writ, and the sheriff by mistake took a bond for the prison bounds, which recited the defendant's imprisonment to have been under a *ca. sa.* Held, the bond was void, and that the surety was not estopped to show there was no *ca. sa.* The grounds of the decision are set forth as fol-

[1] Hudson *v.* Inhabitants of Winslow, 6 Vroom, (N. J.,) 437.

[2] Thomas *v.* Burrus, 23 Miss., 550, per Yerger, J.

[3] Tucker *v.* The State, 11 Md., 322, per Tucker, J.

lows: "It is a general rule of law, and a correct one too, that a man cannot aver against his own deed, but that is where he has alleged some particular fact within his own knowledge and which forms a part of the consideration for his undertaking; and that is the whole extent to which the cases relied on go. But the principle cannot be extended to an allegation coming from the other party, and which can be necessarily known only to him, although contained in the recital of a deed made by the defendant. * The person supposed to be estopped is the very person imposed upon. * It is to be observed that this is an allegation coming from the sheriff and not from the defendant. He could not find under what authority the sheriff acted but by his own representation; a person is only estopped from denying his own acts, but not the acts of another."[1]

§ 33. **Cases holding guaranty of note negotiable.**—There is an irreconcilable conflict of authority as to whether or not a guaranty is negotiable, and when, if at all, it passes by an assignment of the original obligation, and there is no decided preponderance of authority either way. A stranger to a negotiable promissory note indorsed it in blank when it was made. The payee transferred the note, and the holder wrote a guaranty above the stranger's indorsement and brought suit upon it: Held, he was entitled to recover.[2] The court said: "The guaranty is general, specifying no person to whom the guarantor undertakes to be liable, and is upon the back of a negotiable instrument. In such case the guaranty runs with the instrument on which it is written and to which it refers, and partakes of its quality of negotiability, and any person having the legal interest in the principal instrument, takes in like manner the incident, and may sue upon the guaranty." A guaranty on the back of a negotiable promissory note, signed by the payee, was as follows: "I guaranty the payment of the within note." Held, the guaranty passed with the note, so that any subsequent *bona fide* holder, as well as the first holder after the guaranty was made, might sue on the guaranty.[3] These cases hold

[1] Miller *v.* Bagwell, 3 McCord, Law (So. Car.,) 429, per Nott, J.

[2] Webster *v.* Cobb, 17 Ill. 459. See, also, on same point, Heaton *v.* Hulbert, 3 Scam. (Ill.) 489.

[3] Partridge *v.* Davis, 20 Vt. 499. To the same effect see Killian *v.* Ashley, 24 Ark. 511. See, also, Studabaker *v.* Cody, 54 Ind. 586.

that where the guaranty is general, specifying no particular person to whom it runs, it is negotiable and passes with the note, and may be sued on at law, in his own name, by any subsequent holder of the note. It has been held that where the guaranty of a promissory note is a separate instrument from the note, the title to it will pass by delivery with the note for a good consideration, and this, without any written assignment of the guaranty.[1] It has likewise been held that when a guaranty is written on a promissory note, and the note is transferred, the sale and delivery of the note with the guaranty upon it furnishes *prima facie* evidence of a sale of the contract of guaranty, and that the holder of the note is the owner of the guaranty.[2] A general guaranty of payment of a promissory note which named no person as the party guarantied, was not written on nor attached to the note, and it was held that it might be enforced at law by any one who advanced money upon it declaring on it as a promise to himself. But it was further held, that the guaranty not being attached to nor a part of the note, was not negotiable, and an action could only be brought upon it in the name of the person in whose hands it first became available. The court said that if it had been attached to the note, it might have been treated as an indorsement, and would have been negotiable.[3] Where a guaranty written on a promissory note named the person guarantied, and proceeded, "I hereby guaranty the payment and collection of the within note to him or bearer," it was held that any subsequent holder of the note might sue on it in his own name.[4] The court said, it was a new note for the payment of money, and by its terms negotiable. A note was drawn and signed by H, payable to N, and indorsed by N, the latter being an accommodation indorser for H, who was the principal. E guarantied the note generally on its back, and the note was discounted by a bank, and the bank sued E on his guaranty. Held, the bank need not prove affirmatively that the contract of guaranty was made with it. As N indorsed for the accommodation of H, and the bank was the first holder for value, the law implied that the guaranty was made to it. The court

[1] Gould *v.* Ellery, 39 Barb. (N. Y.) 163.

[2] Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516.

[3] McLaren *v.* Watson's Exrs., 26 Wend. 425, per Walworth, C. Senator Verplanck, in an able and exhaustive opinion, contended that the guaranty in this case was negotiable, but the majority of the Court of Errors held otherwise.

[4] Ketchell *v.* Burns, 24 Wend. 456, per Nelson, C. J.

said, that the guaranty was not distinguishable from a general letter of credit, on which an action might be maintained in the name of the person who gave the credit on the faith of it.[1]

§ 34. **Cases holding that guaranty of debt passes to assignee of debt.**—When the guaranty is not of the payment of a note, it has also been held that it passes by a transfer of the debt as an incident thereto. Thus, where a party by a separate covenant guarantied the payment of rent and the performance of the covenants of a lease, it was held that the guaranty run with the land and passed to the grantee of the reversion, who might sue the guarantor in his own name for a breach of the covenant. The court said: "When the thing to be done or omitted concerns the lands or estate, that is the medium which creates the privity between the plaintiff and defendant."[2] A being the owner of a bond and mortgage securing the same, by writing on the back of the mortgage, assigned the bond and mortgage to B, and the assignment then proceeded, "and hereby guaranty the collection of the within amount as it becomes due." B assigned the bond and mortgage to C, the assignment to C saying nothing about the guaranty. C sued A on the guaranty in his own name at law, and it was held he had a right to maintain the suit, even though the guaranty was not, in terms, assigned to him. "The transfer of the debt to him carried with it as an incident all the securities for its payment."[3] It has been held that parol evidence is competent to rebut the presumption that a judgment against an indorser passes by an assignment of a judgment against the principal when nothing is said in the assignment about the judgment against the indorser.[4] The state of Virginia guarantied the payment of interest on coupon bonds issued by the city of Wheeling, the guaranty being that the state guarantied the "punctual payment of the interest." It was held that if the guaranty was not transferable at law, it was in equity, and an interest passed in equity to each successive holder of the bond or coupon. The guaranty is an accessory of the bond or coupon, and follows and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment

[1] Northumberland Bank v. Eyer, 58 Pa. St. 97, per Sharswood, J.

[2] Allen v. Culver, 3 Denio, 284, per Jewett, J.

[3] Craig v. Parkis, 40 New York, 181, per Lott, J.

[4] Bank v. Fordyce, 9 Pa. St. 275.

of the bond or coupon.[1] H and O being partners, H sold out his interest in the firm property to O, who agreed to pay the firm debts, among them a debt due to the plaintiff. The defendant guarantied the performance of this agreement. The plaintiff's debt not having been paid, H assigned to him his interest and claim under the agreement and the guaranty: Held, the plaintiff was entitled to recover against the defendant on the guaranty, which having been made for his benefit, he could adopt and enforce.[2] Under a similar state of facts, except that H did not assign the agreement and guaranty to the plaintiff, it was held that there was no privity between the plaintiff and the defendant, and the plaintiff could not recover against the defendant.[3]

§ 35. **Cases holding guaranty of note not negotiable.**—The payee of a negotiable promissory note indorsed it as follows: "I guaranty the payment of the within note without demand or notice," and sold it to A, who sold it to B, and B sued the guarantor on the guaranty: Held, the guaranty was not negotiable, and the action could not be maintained.[4] Where a stranger to a note indorsed it in blank, and added to his name the word "holden," it was held that this constituted him a guarantor, but that the guaranty was not negotiable, and could be enforced by no one except the person with whom it was made.[5] A negotiable promissory note and a guaranty of its payment by a stranger indorsed thereon, were made at the same time: Held, the guaranty was not negotiable, and did not pass by a transfer of the note.[6] Where a guaranty was made on the back of a promissory note after the note was delivered, it was held that it did not pass by an assignment of the note.[7] A negotiable promissory note was signed by A as maker. Underneath the note was written the following guaranty: "We will guaranty the payment of the above note given to (A) for forty-two hundred and eighty dollars:" Held, the guaranty was not negotiable, not being so by its terms, and

[1] Arents v. The Commonwealth, 18 Gratt, (Va.) 750.

[2] Claflin v. Ostrom, 54 New York, 581.

[3] Campbell v. Lacock, 40 Pa. St. 448.

[4] Springer v. Hutchinson, 19 Me. 359. To the same effect, see Ten Eyck v. Brown, 3 Pinney (Wis.) 452, and Turley v. Hodge, 3 Humph. (Tenn.) 73.

[5] Irish v. Cutter, 31 Me. 536.

[6] Tinker v. McCauley, 3 Mich. 188.

[7] How v. Kemball, 2 McLean, 103. In Levi v. Mendell, 1 Duvall (Ky.) 77, it was held that only the equitable title to a guaranty on the back of a note passed by an assignment of the note.

that it could not be sued on by any one except the person to whom it was originally given.[1]

§ 36. **Cases holding guaranty of bond not negotiable—When guaranty on back of note transfers title to note—Obligation of surety cannot be sold alone.**—A party guarantied the payment of a certain bond and mortgage "to Arthur Childs, the present owner and holder of said bond and mortgage, his executors and administrators." Held, the guaranty was a personal one, confined to Childs, his executors and administrators, and that the assignee of the bond and mortgage could not maintain an action on the guaranty.[2] It has also been held, that a covenant of guaranty, written on the back of a bond, is no part of the bond, and does not pass by an assignment of it.[3] A guaranty on the back of a negotiable promissory note signed by the payee, although it may not itself be negotiable, is a sufficient indorsement of the note to transfer the title to it.[4] Principal and surety signed an obligation, judgment was recovered against the holder of the obligation, and at an execution sale the debt due by the surety was sold, the principal being insolvent. It was held that the sale was invalid and that the obligation of a surety could not be sold separate from that of the principal. The court said the obligation of the surety was accessory to that of the principal and could not be separated from it.[5]

[1] Smith *v.* Dickinson, 6 Humph. (Tenn.) 261.

[2] Smith *v.* Starr, 4 Hun., (N. Y.,) 123.

[3] Beckley *v.* Eckert, 3 Pa. St., 292.

[4] Myrick *v.* Hasey, 27 Me., 9. To same effect, see Heaton *v.* Hulbert, 3 Scam. (Ill.,) 489.

[5] Andrus *v.* Chretien, 7 La. O. S. (4 Curry,) 318.

CHAPTER II.

OF THE STATUTE OF FRAUDS.

§ 37. **Text of the statute of frauds—General observations.**—It was not necessary at common law that the contract of a surety or guarantor should be in writing in order to charge him. This being so, the Statute 29, Charles II., Chapter 3, commonly called the Statute of Frauds, was passed. The fourth section of that statute, so far as pertinent to the subject under consideration, was as follows, viz.: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." The object of this statute was the "prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury," and in certain cases, which from their nature particularly demanded it, the substitution of the certainty of written, for the uncertainty of unwritten, evidence. It was a wise and salutary enactment, and has been in terms, or with more or less modifications, generally re-enacted in the United States. Many decisions have been rendered on every portion of the Statute of Frauds, and among them will be found great conflict of authority. Perhaps the clearest method of presenting this subject will be to commence with the first words of the statute as above given, and proceed seriatim to the last, and this course will be pursued.

§ 38. **Effect of the words "no action shall be brought."**— The Statute of Frauds does not provide that the contract to answer for another shall be illegal or void if not in writing. It says "no action shall be brought." The contract is just as legal since the enactment of the statute as it was before, but no action can be brought to enforce it. In most cases this amounts to the same thing as if the contract had been declared illegal, but in other cases it does not. When the contract has been entirely executed on both sides, the statute will not in any manner affect the relations of the parties.[1] Money paid by a surety or guarantor in pursuance of an unwritten promise cannot be recovered back by him, although he could not have been compelled by law to pay it, and in such case, the principal will be obliged to reimburse the surety or guarantor for the money thus paid.[2] By virtue of the authority of courts over their own officers, they will sometimes enforce an unwritten agreement by their officers which could not otherwise be enforced, because of the Statute of Frauds. Thus the attorney for the defendant in a case, in consideration of the plaintiff staying proceedings therein, agreed to compromise the action and give his two promissory notes in payment. This he afterward refused to do, and the court entered a rule upon him compelling him to carry out his agreement. The court said: "Even supposing the undertaking to be void by the Statute of Frauds, this court may nevertheless exercise a summary jurisdiction over one of its own officers, an attorney of the court. The undertaking was given by the party in his character of attorney, and in that character the court may compel him to perform it. An attorney is conusant of the law, and if he give an undertaking which he knows to be void, he shall not be allowed to take advantage of his own wrong, and say that the undertaking cannot be enforced."[3] As the prohibition is against the remedy, the courts of a country in which the statute prevails, will not enforce an unwritten contract of suretyship or guaranty made in another country, which was perfectly valid and enforce-

[1] Stone *v.* Dennison, 13 Pick., 1; Lord Bolton *v.* Tomlin, 5 Adol. & Ell. 856; Mushat *v.* Brevard, 4 Dev. (Nor. Car.) 73.

[2] Shaw *v.* Woodcock, 7 Barn & Cres. 73; McCue *v.* Smith, 9 Minn. 252; Crane *v.* Gough, 4 Md. 316; Pawle *v.* Gunn, 4 Bing. N.C. 445; Andrews *v.* Jones, 10 Ala. 400; Watrous *v.* Chalker, 7 Conn. 224; Craig *v.* Vanpelt, 3 J. J. Marsh, (Ky.) 489.

[3] *In re* Greaves, 1 Cromp. & Jer. 374, n.; see, also, Evans *v.* Duncan, 1 Tyrw. 283.

able in the country where the contract was made.[1] This is upon the principle that while the validity and binding force of a contract depends upon the law of the country in which it is made, the remedy is always governed by the law of the country in which the action is brought. When a promise is, as to the thing promised, partly within and partly not within the Statute of Frauds, if the parts are so connected that the contracting parties must reasonably be considered to have contracted with reference to the performance of the whole, or a distinct promise cannot reasonably be made out as to the portion not within the statute, no action can be brought on any portion of the contract;[2] but where the portion of the promise which is not within the statute can be separated from that which is, an action, may be sustained upon the portion not within the statute.[3]

§ 39. **Meaning of the words "any special promise."**—With reference to the kind of promise which the statute provides shall be in writing, the words are "any special promise." The intention was by these words to confine the statute to actual promises or promises in fact made, and so it has been interpreted.[4] Promises implied by law are not within the operation of the statute.

§ 40. **What included in the words "debt, default or miscarriage."**—The liability which the statute contemplated, was for the "debt, default or miscarriage of another." These words "debt, default or miscarriage," include torts of the principal as well as breeches of contract by him, and apply to every case in which one person can become responsible for another. It seems at one time to have been considered, that if the principal was not chargeable on a contract, but was only liable in tort, the promise to answer for him would not be within the statute,[5] but all doubts on this subject have been set at rest, and it is settled that a promise to answer for the tort of another is within the statute. Thus, where

[1] Leroux v. Brown, 12 Com. B. 801; see, also, Huber v. Steiner, 2 Scott, 304.

[2] Chater v. Becket, 7 Term. R. 201; Thomas v. Williams, 10 Barn & Cres. 664; Thayer v. Rock, 13 Wend. 53; McMullen v. Riley, 6 Gray, 500; Dyer v. Graves, 37 Vt. 369.

[3] Wood v. Benson, 2 Cromp. & Jer. 94; *Id.* 2 Tyrwh. 93; Rand v. Mather, 11 Cush. 1; see, also, Hess v. Fox, 10 Wend. 436; Trowbridge v. Wetherbee, 11 Allen, 361; Wetherbee v. Potter, 99 Mass. 354; Dock v. Hart, 7 Watts & Serg. 172.

[4] Pike v. Brown, 7 Cush. 133; Sage v. Wilcox, 6 Conn. 81; Goodwin v. Gilbert, 9 Mass. 510; Allen v. Pryor, 3 A. K. Marsh, (Ky.) 305.

[5] Buckmyr v. Darnall, 2 Ld. Raym. 1085; see, also, Reed v. Nash, 1 Wils. 305.

one person, without the license of another, had ridden such other's horse and thereby caused its death, it was held that a promise by a third person to answer the damage caused thereby, in consideration that the owner of the horse would not bring an action against the person causing its death, was within the statute, and no action could be brought upon it unless it was in writing. The court said: "The wrongful riding the horse of another without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and therefore, in my judgment, falls within the meaning of the word 'miscarriage.'"[1] These words have been variously commented upon by different courts. It has been said by some that the words "debt" and "default," both referred to a liability accruing upon a contract; the word "debt" to such as is already incurred, and the word "default" to such as may be incurred in the future:[2] Of the word "miscarriage" it has been said: "Now the word 'miscarriage' has not the same meaning as the word 'debt' or 'default;' it seems to me to comprehend that species of wrongful act for the consequences of which the law would make the party civilly responsible."[3] Whatever meaning may be attached to any one of these words, the three together cover every case in which a surety or guarantor can become responsible in a civil action for another.

§ 41. **The words "of another," contemplate the present or future primary liability of a principal.**—The words, "of another person," have given rise to a vast number of decisions. As said by an able court: "The cases on this branch of the Statute of Frauds are so numerous that it would be a difficult task to review them; and the distinctions as to cases which are or are not within the statute are so nice, and often so shadowy, that it would be still more difficult to reconcile them."[4] The result of the authorities is that in order to bring the promise within the prohibition of the statute, it must be "collateral" to a liability on the part of a principal. In other words, there must at the time the promise is made, be an actual primary liability of a

[1] Kirkham v. Marter, 2 Barn. & Ald. 613, per Abbott, C. J.; see, also, to same effect, Turner v. Hubbell, 2 Day, (Conn.) 457.

[2] Castling v. Aubert, 2 East, 325; per Lord Ellenborough; see, also, Mountstephen v. Lakeman, Law Rep. 7 Q. B. 196, per Willes, J.

[3] Kirkham v. Marter, 2 Barn. and Ald. 613, per Abbott, C. J.

[4] Shaw C. J., in Chapin v. Lapham, 20 Pick. 467.

principal to the promisee which continues after the making of the promise, or there must be contemplated, as the basis of such promise, the future primary liability of a principal. The foundation of the contract of suretyship and guaranty, is the primary liability of another. In order to a clear and full understanding of the above general statement of the result of the authorities on this subject, a more detailed examination of such authorities will be necessary.

§ 42. **If there is no remedy against a third party, the promise need not be in writing—Leading case.**—A leading and celebrated case on this subject is reported as follows: "Declaration—that in consideration the plaintiff would deliver his gelding to A, the defendant promised that A should re-deliver him safe, and evidence was given that the defendant undertook that A should re-deliver him safe; and this was held a collateral undertaking for another, for where the undertaking comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but his servant, and there is no remedy against him, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment against the original hirer, as well as assumpsit upon the promise against the defendant. *Et per cur;* if two come to a shop, and one buys, and the other, to gain him credit, promises the seller, 'if he does not pay you, I will,' this is a collateral undertaking, and void without writing, by the Statute of Frauds. But if he says, 'let him have the goods, I will be your paymaster,' or 'I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant."[1] The principle here announced, that if there is "no remedy" against the third person, the promise is original and need not be in writing, has been applied to a great variety of circumstances.

§ 43. **When no liability incurred by third person, promise need not be in writing—Liability of principal need not be ex-**

[1] Buckmyr *v.* Darnall, 1 Salk. 27; same case reported 6 Mod. 248, and 2 Lord Raym. 1085. For a review of this case, and generally on this subject, see opinion of Willes, J., in Mountstephen *v.* Lakeman, Law Rep. 7 Q. B. 196.

press.—When no liability, present or prospective, is incurred by a third person, that is, when there is no principal, the Statute of Frauds does not apply. Thus, where A brought an action for assault and battery against B, and the case was about to be tried, and C, in consideration that A would withdraw his record, verbally promised to pay him fifty pounds and costs: Held, the promise of C was not within the statute.[1] The ground upon which the decision was put is thus stated by the court: "Johnson [B] was not a debtor; the cause was not tried; he did not appear to be guilty of any debt, default or miscarriage; there might have been a verdict for him, if the cause had been tried, for anything we can tell; he never was liable to the particular debt, damages or costs." So where a party promised, in consideration of the widow of an intestate, permitting him to be joined with her in the letters of administration, that he would make good any deficiency of assets to pay debts, it was held the statute did not apply.[2] On the same principle, where goods are furnished to a person gratuitously, a verbal promise of a third person to pay for them is binding.[3] While there must be a liability on the part of some one to which the liability of the promisor is collateral, such liability need not be express; it is sufficient if it is implied by law.[4] In all cases where the promise is to answer for the tort of the principal, it is manifest that the liability of the principal is implied by law.

§ 44. **When party for whom promise is made cannot become liable, promise need not be in writing.**—A promise to answer for a party not legally competent to contract, or not answerable for his wrongful acts, is not within the Statute of Frauds, as to any matter within such disability. There is in such case no liability on behalf of any one to which the promise is collateral. It is therefore an original promise, and need not be in writing.[5] Thus A procured B to advance money to pay for work in the garden of an infant. B sued A for the money, and the question was as to whether the evidence was sufficient to sustain the verdict. Al-

[1] Read v. Nash, 1 Wils. 305, per Lee, C. J.

[2] Tomlinson v. Gill, Amb. 330.

[3] Loomis v. Newhall, 15 Pick. 159.

[4] Redhead v. Cator, 1 Starkie, 12; Whitcomb v. Kephart, 50 Pa. St. 85.

[5] As bearing on the question whether a promise to answer for a married woman need or need not be in writing, see Connerat v. Goldsmith, 6 Ga. 14; White v. Cuyler, 1 Esp. 200; *Id.* 6 Term R. 176; Darnell v. Tratt, 2 Car. & P. 82; Kimball v. Newell, 7 Hill, 116.

though not strictly necessary to the decision of the case, one judge said: "The infant was not liable, and therefore it could not be a collateral understanding. It was an original undertaking of the defendant to pay the money."[1] A father requested a merchant to assist his minor son in business, and promised verbally to indemnify him against any loss he might incur in so doing, and it was held the promise need not be in writing. The court, after saying that the son was a minor and not liable for the debt, proceeded: "The undertaking and promise of the defendant, therefore, was not collateral to any promise of the son, but was separate, independent and original."[2] A tailor furnished an infant ward with a frock coat, without the order of the guardian, but the guardian afterwards, in consideration of indulgence, verbally promised the tailor to pay for the coat. Held, the guardian was liable. The court, after saying that the ward was not liable for the price of the coat, said: "the promise of the defendant [the guardian] was original, and binding on him."[3] A wife, whose husband had died, leaving her his estate for life, remainder to his nephew, herself died, leaving particular directions as to her funeral. These directions a friend of the family undertook to see carried out, and bought certain articles for that purpose, telling the merchant verbally that the estate of the husband would pay for them, and if it did not, she would. Held, the estate of the husband was not liable for the articles thus purchased, and such friend was liable on her verbal promise. The court said: "When no action will lie against the party undertaken for, it is an original promise."[4]

[1] Foster, J., in Harris v. Huntbach, 1 Burrow, 373.

[2] Shaw, C. J., in Chapin v. Lapham, 20 Pick. 467. The same principle was applied where a father promised to pay for a substitute in the army for his minor son who had been drafted; see Downey v. Hinchman, 25 Ind. 453; see, also, Duncombe v. Tickridge, Aleyn, 94.

[3] Roche v. Chaplin, 1 Bailey, (So. Car.) 419, per Johnson, J. In Dexter v. Blanchard, 11 Allen, 365, the Supreme Court of Massachusetts decided expressly that the verbal promise of a father to pay the debt of a minor son, was within the Statute of Frauds, and must be in writing, even though it was a debt which the son could not be coerced to pay. The decision was placed upon the ground that the contract of the minor was not void, but voidable, and was valid till avoided, etc. Neither the preceding case of Chapin v. Lapham, 20 Pick. 467, in the same court, nor any of the cases herein cited on this subject, were referred to or noticed. The cases referred to in the text seem to be founded on much the better reason, and are more in harmony with the cases on other phases of this subject.

[4] Mease v. Wagner, 1 McCord, (So. Car.) 395, per Huyer, J. See,

§ 45. **When promise to indemnify within the statute—Principles involved.**—With reference to whether a promise to indemnify a person from loss in consequence of such person doing an act or assuming an obligation is within the statute, no general rule which will reconcile all the cases can be laid down. A mere promise of indemnity which is not collateral to any liability on the part of another, either express or implied, is not within the statute, and such a case illustrates the rule that when there is no principal the promise need not be in writing. On the other hand, when the promise to indemnify is in fact a promise to pay the debt of another, then clearly such promise is within the statute, and the fact that it is in form a promise to indemnify will make no difference.[1] These propositions are correct in principle and are fully sustained by authority. Many cases do not fall plainly under either head, and the confusion in the authorities has chiefly arisen from not keeping the distinction between the two cases clearly in mind, or from the application of these recognized principles to different states of fact. Great stress has often been laid upon the word "indemnify," when in fact none should be given to it and the actual transaction should be carefully scanned to ascertain the true nature and bearings of the promise. The law on this subject has been thus stated by a celebrated judge: "Now it has been laid down that a mere promise of indemnity is not within the Statute of Frauds, and there are many cases which would exemplify the correctness of that decision. On the other hand, an undertaking to answer for the debt or default of another, is within the Statute of Frauds, and no doubt some cases might be put where it is both the one and the other: that is to say, where the promise to answer for the debt or default of another would involve what might very properly and legally be called an indemnity. Where that is the case, in all probability the undertaking would be considered as within the Statute of Frauds if it were to answer for the debt or default of another, notwithstanding it might also be an indemnity."[2]

§ 46. **When promise to indemnify need not be in writing—Instances.**—A promise to indemnify a party against loss if he

also, Drake *v.* Flewellen, 33 Ala. 106.

[1] Carville *v.* Crane, 5 Hill, 483: See generally, on this subject, the exhaustive opinion of Comstock C. J., in Mallory *v.* Gillett, 21 New York, 412.

[2] Per Pollock C. B. in Cripps *v.* Hartnoll, 4 Best & Smith, 414.

will commence or defend a suit, has been held not to be within the Statute of Frauds. As where the indorser of a dishonored bill of exchange verbally promised to indemnify a subsequent indorsee against costs if he would bring an action against the acceptor, it was held the promise was not within the statute.[1] A promise to indemnify a party if he will commit a trespass in order to raise a question of title, has been held not to be within the statute. The court said: "The promise was not to indemnify for the default of another; but was made to the plaintiff himself for an act to be done by him as the servant of the defendant below. It was an original understanding, and not a collateral promise."[2] So, also, a verbal promise to indemnify an occupier of land if he will resist a suit of the vicar for tithes, has been held not to be within the statute.[3] An attorney authorized a distress for rent due his client, and verbally promised to indemnify the party executing the distress warrant from damage by reason of the goods being privileged from distress. Held, the promise to indemnify was not within the statute.[4] A party agreed to pay a certain sum annually to certain trustees of a church toward the support of a minister. The minister, for a consideration, promised to indemnify the party against loss by reason of such agreement. Held, the promise was not within the statute.[5] Where A being bound to indemnify B in a certain civil suit in which he was arrested, requested C to become special bail for B, and promised to indemnify him, the promise was held to be an original undertaking and not within the statute. This decision was put upon the ground, that as A was himself bound for B, the promise to C was for A's own benefit.[6] A promise to indemnify one if he will become bail for another in a criminal case, has been held not to

[1] Bullock v. Lloyd, 2 Car. and P. 119. See, also, to same effect, Howes v. Martin, 1 Esp. 162; *contra*, Winckworth v. Mills, 2 Esp. 484.

[2] Per Redcliff, J. in Allaire v. Ouland, 2 Johns. Cas. 52. See, also, to same effect, Marcy v. Crawford, 16 Conn. 549; and see Weld. v. Nichols, 17 Pick. 538; Chapman v. Ross, 12 Leigh, (Va.) 565.

[3] Adams v. Dansey, 6 Bing. 506. See comments on this case by Lord Denman in Green v. Creswell, 10 Adol. and Ell. 453; and see Goodspeed v. Fuller, 46 Me. 141.

[4] Toplis v. Grane, 5 Bing. (N.C.) 636.

[5] Conkey v. Hopkins, 17 Johns, 113.

[6] Harrison v. Sawtel, 10 Johns, 242. See, also, Ferrell v. Maxwell, 28 Ohio St. 383. In a celebrated case which differed from the above, only in the fact that A was not bound to indemnify B, it was held that the promise must be in writing. Green v. Creswell, 10 Adol. and Ell. 453, *Id.* 2 Perry & Dav. 430.

be within the statute.[1] The reason given for this holding in one case, is that the person bailed is under no obligation to indemnify the bail, and in another, is that if the person bailed is under an implied obligation to indemnify the bail the party requesting the bail to become such should be held to be the original promisor, and the party bailed, only collaterally liable. Where a party who was surety for the maker of a note procured others to sign as sureties, by promising to indemnify them, and save them harmless, it was held that such promise was an original undertaking, and not within the statute.[2]

§ 47. **When promise to indemnify must be in writing—Instances.**—Where an attorney requested a party to execute to the sheriff a bail bond in a civil case for his client, and promised to indemnify such party for so doing, it was held the promise was within the statute. The court said the test was that "the original party remained liable, and the defendant incurred no liability except from the promise."[3] A promise by one person to indemnify another against loss or damage in becoming the surety for a third in an undertaking of replevin, has been held to be within the statute.[4] The court said: "If, therefore, the third person against whose debt, default or miscarriage the promise of indemnity is made, would himself be legally liable to pay the promisee such debt or damage, the promise of indemnity is to be regarded

[1] Cripps *v.* Hartnoll, 4 Best and Smith, 414; Holmes *v.* Knights, 10 New. Hamp. 175.

[2] Horn *v.* Bray, 51 Ind. 555. To same effect, see Thomas *v.* Cook, 8 Barn. & Cress. 728; *Id.* 3 Man. & Ry. 444. For cases holding or tending to establish that under various circumstances a promise to indemnify need not be in writing, see Chapin *v.* Merrill, 4 Wend. 657; Barry *v.* Ransom, 12 New York, 462; Taylor *v.* Savage, 12 Mass. 98; Smith *v.* Sayward, 5 Greenl. 504; Aldrich *v.* Ames, 9 Gray, 76; Cutter *v.* Emery, 37 New Hamp. 567; Harris *v.* Brooks, 21 Pick. 195; Whitehouse *v.* Hanson, 42 New Hamp. 9; Blake *v.* Cole, 22 Pick. 97; Hodges *v.* Hall, 29 Vt. 209; Hendrick *v.* Whittemore, 105 Mass. 23; Keith *v.* Goodwin, 31 Vt. 268; Byers *v.* McClanahan, 6 Gill. & Johns. 250; Dunn *v.* West, 5 B. Mon. (Ky.) 376; Apgar's Admr. *v.* Hiler, 4 Zab. (N. J.) 812; Lucas *v.* Chamberlain, 8 B. Mon. (Ky.) 276; Marsh *v.* Consolidation Bank, 48 Pa. St. 510; D'Wolf *v.* Raband, 1 Peters, 476; Stocking *v.* Sage, 1 Conn. 519; Jones *v.* Shorter, 1 Kelley (Ga.) 294; Townsley *v.* Sumrall, 2 Peters, 170; Emerson *v.* Slater, 22 How. (U. S.) 28; Shook *v.* Vanmater, 22 Wis. 507.

[3] Per Lord Denman in Green *v.* Cresswell, 2 Perry & Dav. 430; *Id.* 10 Adol. & Ell. 453.

[4] Easter *v.* White, 12 Ohio St. 219, per Sutliff, J. See to same effect, Kingsley *v.* Balcombe, 4 Barb. (N. Y.) 131.

as collateral to his liability as principal, and within the statute." A promise by one person to another that he will indemnify such other from loss which he may sustain by reason of signing a sheriff's bond, has been held to be within the statute.[1] The same thing was held when one who was himself indemnified by property of the principal, promised to indemnify a third person if he would sign a note of the principal as surety.[2] From the examples given, the confusion in the authorities on this subject will be apparent, as well as the necessity of carefully analyzing the facts of each case as it arises, and applying to it the principles which have already been shown to be established.

§ 48. **If original debt extinguished or novated, promise not within the statute.**—When the new promise has the effect of extinguishing the old debt, it amounts to an original undertaking, and is not within the statute.[3] In such case there is no third person liable as principal; there is no liability to which the promise is collateral; nor is there any obligation with which the promise concurs or runs together. A son did work for his father, for which the father was indebted, and the defendant, in consideration of the son releasing the father from such debt, verbally promised to pay it. Held, the promise was not within the statute, and the defendant was bound.[4] The court said: "The plaintiff discharged the debt due to him from his father, in consideration of the defendant's promise to pay him the amount due him. This promise was not a promise to pay the debt of another within the Statute of Frauds, but an original undertaking. The defendant promised to pay the money, not as surety or guarantor,

[1] Brown v. Adams, 1 Stew. (Ala.) 51.

[2] Draughan v. Bunting, 9 Ired. Law. (Nor Car.) 10. For cases holding or tending to show that certain promises to indemnify must be in writing, see Simpson v. Nance, 1 Spears (So. Car.) 4; Martin v. Black's Exrs. 20 Ala. 309. Brush v. Carpenter, 6 Ind. 78; Macey v. Childress, 2 Tenn. Ch. R. (Cooper) 438.

[3] Curtis v. Brown, 5 Cush. (Mass.) 488; Allshouse v. Ramsay, 6 Wharton (Pa.) 331; Stone v. Symmes, 18 Pick. 467; Bird v. Gammon, 3 Bing. N. C. 883. As further illustrating this subject, see Gull v. Lindsay, 4 Wels. Hurl. & Gor. 45; Eddy v. Roberts, 17 Ill. 505; Watson v. Randall, 20 Wend. 201; Click v. McAfee, 7 Port, (Ala.) 62; Mead v. Keyes, 4 E. D. Smith (N. Y.) 510; Gleason v. Briggs, 28 Vt. 135; Andre v. Bodman, 13 Md. 241; Watson v. Jacobs, 29 Vt. 169; Robinson v. Lane, 14 Sm. & Mar. (Miss.) 161; Quintard v. D'Wolf, 34 Barb. (N. Y.) 97; Mosely v. Taylor, 4 Dana, (Ky.) 542; Stewart v. Hinkle, 1 Bond, 506; Hedges v. Strong, 3 Oregon, 18.

[4] Wood v. Corcoran, 1 Allen, (Mass.) 405, per Hoar, J.

but as the sole debtor; not as a collateral promise, but as a substituted promise. There was no debt of another as soon as the defendant's promise was made." Where a party was taken on a *ca. sa.* and in consideration of the creditor discharging him from custody, a third person verbally promised to pay the debt, it was held that by such discharge the debt was extinguished, and the promise was not within the statute. The court said: "By the discharge of Chase with the plaintiff's consent, the debt as between those persons was satisfied. * Then, if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase."[1] For the same reasons, where there is an entire novation of the debt, and the third party becomes verbally bound for the new debt along with the original debtor, the new agreement is not within the statute. Thus, where one person was indebted, and entered into partnership with another, and the two said to the creditor of the one that they wished the debt to be their joint debt, and they would pay it, and the creditor consented, it was held the agreement was binding upon both, and need not be in writing, the effect of the agreement being to extinguish the first debt, and substitute another for it.[2]

§ 49. **When promise to pay out of proceeds of debtor's property not within statute.**—A promise to pay the debt of another out of the proceeds of property of such other, placed in the hands of the promisor for that purpose, is not within the statute.[3]

[1] Goodman *v.* Chase, 1 Barn & Ald. 297, per Lord Ellenborough, C. J.; to same effect, see Lane *v.* Burghart, 1 Adol. & Ell. (N. S.) 933; Cooper *v.* Chambers, 4 Dev. (N. C.) 261; Butcher *v.* Stewart, 11 Mees. & Wels. 857; Maggs *v.* Ames, 4 Bing. 470.

[2] *Ex parte* Lane, 1 De Gex. 300; see, also, on this subject, Baker *v.* Briggs, 8 Pick. 122; Choppin *v.* Gobbold, 13 La. An. 238; Roth *v.* Miller, 15 Serg. & Rawle. 100; Sneed's Exrs. *v.* White, 3 J. J. Marsh (Ky.) 525; Musgrave *v.* Glasgow, 3 Ind. 31.

[3] Meyer *v.* Hartman, 72 Ill. 442; Runde *v.* Runde, 59 Ill. 98; Corbin *v.* McChesney, 26 Ill. 231; Stephens *v.* Pell, 2 Cromp. & Mees. 710; *Id.* 4 Tyrwh. 6; Hitchcock *v.* Lukens, 8 Por. (Ala.) 333; Loomis *v.* Newhall, 15 Pick. 159; Andrews *v.* Smith, Tyrwh. & Gr. 173; *Id.* 2 Cromp. Mees. & Ros. 627; Todd *v.* Tobey, 29 Me. 219; Nelson *v.* Hardy, 7 Ind. 364; Lucas *v.* Payne, 7 Cal. 92; Stoudt *v.* Hine, 45 Pa. St. 30; Consolidated Presbyterian Society *v.* Staples, 23 Conn. 544; Wilson *v.* Bevans, 58 Ill. 232; McLaren *v.* Hutchinson, 22 Cal. 187; Clymer *v.* DeYoung, 54 Pa. St. 118; Cameron *v.* Clark, 11 Ala. 259; Hilton *v.* Dinsmore, 21 Me. 410; Goddard *v.* Mockbee, 5 Cranch, (C. C.) 666; Laing *v.* Lee, Spencer, (N. J.) 337; Lee *v.* Fontaine, 10 Ala. 755; Stanly *v.* Hendricks, 13 Ired. (Nor. Car.) 86; Mc-

In such case the promisor is simply an agent to distribute the property. The promise is an original one for the promisor alone. The party owing the debt is not liable on the promise, nor is any other person liable thereon except the promisor himself. In a leading case, one Taylor being in arrears for rent, and insolvent, conveyed all his effects for the benefit of his creditors, who employed Leper to sell them. On the day advertised for the sale, the landlord came to distrain the goods in the house, whereupon Leper promised to pay the rent if he would desist. Held, this promise was not within the statute.[1] Here the landlord relinquished his prior lien on the property, or in other words, left the property in the hands of Leper, and Leper in effect agreed to apply the proceeds of the sale of the property to the payment of the debt of its owner. One of the judges said that "Leper became the bailiff of the landlord, and when he had sold the goods the money was the landlord's in his own bailiff's hands." Another judge said that Leper was not bound to pay the landlord more than the goods sold for. The property must be within the control of the promisor, in order to take the promise out of the statute; it is not sufficient that he is the agent of those who do control it.[2] A debtor left certain notes of third persons with another for collection, and he promised the debtor to collect the notes and pay the creditor a debt due him from the debtor. Held, the promise was not within the statute.[3] The court said: "This is no undertaking to pay the debt of a third party, within the Statute of Frauds; but it is an agreement by two persons for the use and benefit of a third, upon which such third person may maintain an action against the person promising, without proof of any written memorandum or consideration moving between the promisor and the party for whose benefit the contract has been made. It is a trust which, having once undertaken to execute, and entered upon the performance of the same, although voluntarily and without consideration, other than such as the law implies, he is bound in law and equity to complete." The mere

Kenzie *v.* Jackson, 4 Ala. 230; *Contra*, Jackson *v.* Rayner, 12 Johns. 291.

[1] Williams *v.* Leper, 3 Burr. 1886; *Id.* 2 Wils. 308; to same effect, see Edwards *v.* Kelly, 6 Maule & S. 204; Bampton *v.* Paulin, 4 Bing. 264; Crawford *v.* King, 54 Ind. 6.

[2] Quin *v.* Hanford, 1 Hill (N. Y.), 82.

[3] Prather *v.* Vineyard, 4 Gilman, (Ill.) 40, per Purple, J. To same effect, see Drakeley *v.* Deforest, 3 Conn. 272; Sullivan *v.* Murphy, 23 Minn. 6.

fact, however, that the promisor has in his possession property of the original debtor, which was not deposited with him for the purpose of paying the debt, will not of itself alone take the promise out of the statute.[1] It is also clearly established that when the creditor has a lien on property of the principal for the payment of his debt, which he relinquishes in consideration of the promise, and such lien inures to the benefit of the promisor, the promise is not within the statute.[2]

§ 50. **Creditor relinquishing lien which does not inure to benefit of promisor, does not take promise out of statute.**—Whether the relinquishment of a lien, which the creditor holds upon property of the principal for the payment of the debt, when the lien does not inure to the benefit of the promisor, is sufficient to take the promise out of the statute, seems to be clear upon principle, but is a very vexed question upon authority. In a leading case usually referred to as establishing that the relinquishment of a lien under such circumstances does take the promise out of the statute,[3] the promisor had sent certain carriages belonging to one Copey to the plaintiff to be repaired, and the promisor gave the orders concerning them. The bill for repairs was made out to Copey, but the promisor ordered the carriages packed and shipped, and verbally promised to pay for the repairs. The court[4] held the promise not within the statute, on the ground that the plaintiff had parted with his lien. A landlord, who had a lien for board upon the baggage of his guest, released the lien and allowed the guest to take the baggage upon the verbal promise of a third person to pay the debt. It was squarely held that the promise was not within the statute. The court said: "Where one has a complete and enforceable lien on the property

[1] Dilts *v.* Parke, 1 South. (N. J.) 219; State Bank at New Brunswick *v.* Mettler, 2 Bosw. (N. Y.) 392; Simpson *v.* Nance, 1 Spears (So. Car.) 4; Hughes *v.* Lawson, 31 Ark. 613.

[2] See cases cited in this section. See, also, Teague *v.* Fowler, 56. Ind. 569.

[3] Houlditch *v.* Milne, 3 Esp. 86. It seems, however, that this case can be sustained upon other grounds. The case of Williams *v.* Leper, 2 Wils. 308. *Id.* 3 Burr. 1886, has also by several courts been thought to establish the same proposition, and decisions to that effect have been founded upon its authority. But from a careful examination of that case, it will appear that it is more properly referable to other grounds and that it is an authority showing that a promise to apply the debtor's property in the hands of the promisor for that purpose, to the payment of his debt, is not within the statute.

[4] Lord Eldon.

of his debtor, a promise of a third person to pay the debt on condition that the property under the lien is given up, will be held binding, and not within the Statute of Frauds. This upon the ground that the release of the lien is the surrender of a security operating in the nature of a payment, and therefore if not a benefit to the promisor, is a prejudice to the creditor to the extent of his loss."[1] If, as here suggested, the surrender of the lien discharged the original debt, then, as already shown, the promise for that reason would not be within the statute. But the surrender of the lien does not usually extinguish the original debt. The surrender of the lien being a detriment to the creditor, is undoubtedly a sufficient consideration for the promise, but why it should take the promise out of the statute any more than any consideration which is a detriment to the creditor, or in fact any other sufficient consideration, it is difficult to perceive. What seems to be the true view of this subject and the one which is sustained by the weight of authority, is thus well expressed: "Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage, for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has inured to the benefit of the defendant, there his promise is binding without writing. In such case, though the result is that the payment of the debt of a third person is effected, it is so, incidentally and indirectly, and the substance of the contract is the purchase by the defendant from the plaintiff of the lien, right, or benefit in question. * It is not enough that the plaintiff has relinquished an advantage, or given up a lien in consequence of the defendant's promise, if that advantage has not directly inured to the benefit of the defendant, so as to make it a purchase by the defendant from the plaintiff."[2]

[1] Per Butler, J. in Dunlap v. Thorne, 1 Richardson, (So. Car.) 213; to same effect, or sustaining same view, see Shook v. Vanmater, 22 Wis. 507; Loves case, 1 Salk. 28; Slingerland v. Morse, 7 Johns. 463; Adkinson v. Barfield, 1 McCord (So. Car.), 575; Mercien v. Andrus, 10 Wend. 461; Bushell v. Beavan, 1 Bing. N. C. 103. Nearly all of the authority holding to this effect is founded upon what is believed to be an erroneous view of the grounds upon which Williams v. Leper, 2 Wils. 308, rested. Mr. Brown, in his able work on the Statute of Frauds, pp. 195—204, holds that the mere relinquishment of a lien by the creditor does not take the promise out of the statute.

[2] Per Shaw, C. J. in Curtis v. Brown

§ 51. **When the transaction amounts to a purchase of debt or lien by promisor, promise not within statute.**—When the promise to pay the debt of another is made in consideration of the delivery by the creditor to the promisor of a security for such debt, or of an assignment of the debt itself to the promisor—that is, when the transaction amounts to a sale by the creditor to the promisor of the lien or the debt—the promise is not within the statute. The fact that the payment of the price by the purchaser is to take the form of discharging the debt of another, is an incident in the transaction which does not deprive the purchase of its essential character as such. Thus an agent who had a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, was induced by the defendant to give him the policies, and waive the lien, and the defendant, in consideration thereof, promised to pay one of the acceptances, and to deposit money for the payment of the others as they became due: Held, the promise was not within the statute.[1] The chief justice said that the defendant "had in contemplation, not principally the discharge of Grayson [original debtor], but the discharge of himself. This was his moving consideration, though the discharge of Grayson would eventually follow. It is therefore rather a purchase of the securities which the plaintiff held in his hands. This is quite beside the mischief provided against by the statute, which was that persons should not, by their own unavouched undertaking without writing, charge themselves for the debt, default or miscarriage of another." Another judge said: "This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a

5 Cush. 488; supporting this view, see Chater v. Beeket, 7 Term R. 201; Nelson v. Boynton, 3 Met. (Mass.) 396; Tomlinson v. Gell, 6 Adol. & Ell. 564; Cross v. Richardson, 30 Vt. 641; Alger v. Scoville, 1 Gray, 391; Sampson v. Hobart, 28 Vt. 697; Mallory v. Gillett, 23 Barb. (N. Y.) 610; Smith v. Sayward, 5 Greenl. (Me.) 504; Spooner v. Dunn, 7 Ind. 81; Fish v. Thomas, 5 Gray, 45; Stern v. Drinker, 2 E. D. Smith, (N. Y.) 401; Scott v. Thomas, 1 Scam. (Ill.) 58; VanSlyck v. Pulver, Hill & Denio, (Lalor's sup.) 47; Corkins v. Collins, 16 Mich. 478; Arnold v. Stedman, 45 Pa. St. 186; Bird v. Gammon, 5 Scott, 213; Woodward v. Wilcox, 27 Ind. 207; Stoudt v. Hine, 45 Pa. St. 30; Fullam v. Adams, 37 Vt. 391.

[1] Castling v. Aubert, 2 East, 325, per Lord Ellenborough, C. J., and Lawrence, J. See, also, Walker v. Taylor, 6 Car. & Pa. 752; Fitzgerald v. Dresler, 7 Com. B. N. S. 374.

promise by the defendant to pay what the plaintiff would be liable to pay if the plaintiff would furnish him the means of doing so." In another case, one Marden, being insolvent, a verbal agreement was entered into between several of his creditors and one Weston, whereby Weston agreed to pay the creditors ten shillings in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to Weston: Held, the promise of Weston was not within the statute. The court said: "It is perfectly clear that this was a contract to purchase the debts of the several creditors, instead of being a contract to pay or discharge the debts owing by Marden. * Instead of being a contract to discharge Marden from his debts, it was a contract to keep them on foot. * We all agree fully upon the point that it is a contract for the purchase of the debts of Marden, which is not prohibited by the Statute of Frauds.[1]

§ 52. **When promisor who is debtor to third person, agrees to pay his debt to creditor of such third person, promise not within statute.**—If A be indebted to B, and B be indebted to C, and they get together and agree that B's debt to C shall be canceled, and A shall pay the debt which he owed B to C, such agreement is valid and binding without writing.[2] In such case, A pays his own debt with his own money to a substituted creditor, and the fact that by the transaction the debt of another is paid, makes no difference. So, where the defendant's brother was indebted to the plaintiff, and being pressed for payment, sold the defendant

[1] Anstey v. Marden, 1 Bos. & Pul. N. R. 124, per Chambre, J. See, also, as bearing upon this subject, Love's Case, 1 Salk. 28; Allen v. Thompson, 10 New Hamp. 32; Doolittle v. Naylor, 2 Bosw. (N. Y.) 206; French v. Thompson, 6 Vt. 54; Therasson v. McSpedon, 2 Hilton (N. Y.) 1; Hindman v. Langford, 3 Strobh. (So. Car.) 207; Gardiner v. Hopkins, 5 Wend. 23; Olmstead v. Greenly, 18 Johns. 12. Mr. De Colyar, in his valuable work on the Law of Guarantees, pp. 171–174, holds to the view that the following cases may be supported by the rule here under consideration: Houlditch v. Milne, 3 Esp. 86; Barrell v. Trussel, 4 Taunt. 117; Williams v. Leper, 3 Burr. 1886, *Id.* 2 Wils, 308; Edwards v. Kelly, 6 Maule & S. 204; Bampton v. Paulin, 4 Bing. 264.

[2] Dearborn v. Parks, 5 Greenl. (Me.) 81; Wilson v. Coupland, 5 Barn. & Ald. 228; Hodgson v. Anderson, 5 Dow. & Ry. 735; *Id.* 3 Barn. & Cress. 842; Lacy v. McNeile, 4 Dow. & Ry. 7. It seems that the debt of B must be extinguished by the transaction, in order to take the case out of the statute; Jackson v. Rayner, 12 Johns. 291; Wharton v. Walker, 6 Dow. & Ry. 288; Cuxon v. Chandley, 3 Barn. & Cres. 591; Liversidge v. Broadbent, 4 Hurl. & Nor. 603.

a pair of horses at a price less than the debt due the plaintiff, and the defendant promised his brother that he would pay the purchase price to the plaintiff, the court said the promise was not within the statute: "It was not a promise to answer for the debt of another person, but merely to pay the debt of the person making the promise to a particular person designated by him to whom the debt belonged, and who had a right to make such payment a part of the contract of sale. Such promise was no more within the Statute of Frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother, of whom he purchased them."[1]

§ 53. **When promise is in effect to pay promisor's own debt, it is not within statute, although it incidentally guaranty debt of another.**—Whenever the promise is in effect to pay the debt of the promisor, even though the performance of the promise may extinguish the debt of a third person, the promise is not within the statute. A debtor gave to his creditor the note of a third person for the same amount as the debt, and guarantied the payment of the note. Held, the guaranty need not be in writing.[2] The same thing was decided where the payee and holder of a note transferred it in payment of his debt, and guarantied its payment by an instrument, which did not sufficiently express the consideration. The court said: "Although this is in form a promise to answer for the debt or default of another, in substance, it is an engagement to pay the guarantor's own debt in a particular way. He does not undertake as a mere surety for

[1] Per Jewett, J., in Barker *v.* Bucklin, 2 Denio, 45. For cases deciding and tending to establish these views, see Roe *v.* Hough, 3 Salk. 14; Rice *v.* Carter, 11 Ired. (Nor. Car.) 298; Barringer *v.* Warden, 12 Cal. 311; Israel *v.* Douglas, 1 H. Blackstone, 239; Brown *v.* Strait, 19 Ill. 88; Fairlie *v.* Denton, 2 Man. & Ry. 353; *Id.* 8 Barn. & Cress. 395; Ford *v.* Finney, 35 Ga. 258; Cailleux *v.* Hall, 1 E. D. Smith, (N. Y.) 5; Wharton *v.* Walker, 6 Don. & Ry. 288; *Id.* 4 Barn. & Cress. 163; Rowe *v.* Whittier, 21 Me. 545; Cuxon *v.* Chadney, 3 Barn. & Cress. 591; McLaren *v.* Hutchinson, 22 Cal. 187; Meyer *v.* Hartman, 72 Ill. 442; Haydon *v.* Christopher, 1 J. J. Marsh, (Ky.) 382; Connor *v.* Williams, 2 Rob. (N.Y.) 46; Robbins *v.* Ayres, 10 Mo. 538; Clymer *v.* DeYoung, 54 Pa. St. 118; Mt. Olivet Cemetery Co. *v.* Sherbert, 2 Head, (Tenn.) 116; Sanders *v.* Clason, 13 Minn. 379; Maxwell *v.* Haynes, 41 Me. 559.

[2] Dyer *v.* Gibson, 16 Wis. 508. To same effect, see Barker *v.* Scudder, 56 Mo. 272; Hall *v.* Rodgers, 7 Humph. (Tenn.) 536; Fowler *v.* Clearwater, 35 Barb. (N. Y.) 143; Durham *v.* Manrow, 2 New York 533; Adcock *v.* Fleming, 2 Dev. & Batt. Law (Nor. Car.) 225.

the maker, but on his own account, and for a consideration which has its root in a transaction entirely distinct from the liability of the maker."[1] A plaintiff advanced money for a defendant, and in payment of the debt thus created, the defendant transferred to the plaintiff the note of a third person, payable in chattels, and guarantied its payment. Held, the guaranty need not be in writing.[2] The court said: "This was not an undertaking by the defendant to pay the debt of Eastman [maker of note], but an agreement to pay his own debt in a particular way. The plaintiff had upon request paid a debt of twenty-five dollars, which the defendant owed to Sherwood, and had thus made himself a creditor of the defendant to that amount. If the matter had not been otherwise arranged, the plaintiff might have sued the defendant, and recovered as for so much money paid for him upon request. But the plaintiff agreed to accept payment in a different way, to-wit: by the transfer of Eastman's note for the wood-work of a wagon, with the defendant's undertaking that the note should be paid. The defendant, instead of promising that he would pay himself, agreed that Eastman should pay. He might do that whether Eastman was his debtor or not; and the fact that Eastman was a debtor, does not change the character of the defendant's undertaking, and make it a case of suretyship within the Statute of Frauds." The purchaser of personal property agreed by parol, in consideration thereof, to pay certain debts of his vendor due to a third person. Held, the promise was not within the statute. The court said: the promisor "received the property contracted for, and it is wholly immaterial to him what direction was given to the purchase money. The vendor contracted to have it paid to his creditors, instead of himself, and it imposes no hardship upon the purchaser. It was his contract so to pay the purchase money, and such a contract is valid and binding in law, although it is not evidenced by any writing."[3] On

[1] Brown v. Curtiss, 2 New York, 225, per Bronson, J; to same effect, see Dauber v. Blackney, 38 Barb. (N. Y.) 432; Pitts v. Congdon, 2 New York, 352.

[2] Johnson v. Gilbert, 4 Hill, 178, per Bronson, J; Mobile & G. R. R. Co. v. Jones, 57 Ga. 198; Nichols v. Allen, 22 Minn. 283.

[3] Per Scott, J., in Wilson v. Beavans, 58 Ill. 232; to the same effect, and illustrating this subject, see Ashford v. Robinson, 8 Ired. (Nor. Car.) 114; Stewart v. Malone, 5 Phila. 440; Carpenter v. Wall, 4 Dev. & Batt. (Nor. Car.) 144; Huntington v. Wellington, 12 Mich. 10; Ardern v. Rowney, 5 Esp. 254; Smith v. Finch, 2

the same general principles a verbal acceptance or promise to accept a bill of exchange is not within the statute when the promisor has funds of the drawer in his hands to pay it.[1] It amounts to a payment of his own debt, and it makes no difference whether he pay it to the drawer himself or to a creditor of the drawer who is designated by the bill of exchange.

§ 54. **When promisor previously liable, promise not within statute.**—If the promisor is already liable for the payment of the debt, his promise to pay it if a third person does not, is not within the statute. This is but another application of the principle that a promise to pay the promisor's own debt is not within the statute, even though its performance may discharge the debt of another. Thus A, through the agency of a broker, sold a parcel of linseed to B, who, through the same broker, sold it at an increased price to C. The time for C to pay the price was to arrive before that fixed for the payment by B. C sent his clerk to the broker for the delivery order for the seed, and the broker took him to A, from whom the clerk obtained the order, upon the faith of a promise that C would pay A for the seed. It was held that the promise was not within the statute. The court said: "We are all agreed that the case is not within the Statute of Frauds. The law upon this subject is, I think, correctly stated in the notes to Forth *v.* Stanton, 1 Wms. Saund. 211 e, where the learned editor thus sums up the result of the authorities: 'There is considerable difficulty on the subject, occasioned perhaps by unguarded expressions in the reports of the different cases, but the fair result seems to be that the question whether each particular case comes within this clause of the statute (s. 4) or not, depends not on the consideration for the promise, but on the fact of the origi-

Scam. (Ill.) 321; Reed *v.* Holcomb, 31 Conn. 360; Runde *v.* Runde, 59 Ill. 98; Allen *v.* Pryor, 3 A. K. Marsh, (Ky.) 305; Wait *v.* Wait, 28 Vt. 350; Hackleman *v.* Miller, 4 Blackf. (Ind.) 322; Rowland *v.* Rorke, 4 Jones (Nor. Car.) 337; Devlin *v.* Woodgate, 34 Barb. (N. Y.) 252; Jones *v.* Palmer, 1 Doug. (Mich.) 379; Cardell *v.* McNeil, 21 New York, 336; Gold *v.* Phillips, 10 Johns. 412; Hodgson *v.* Anderson, 5 Dow & Ry. 735; *Id.* 3 Barn & Cres. 842; Stephens *v.* Squire, 5 Modern, 205; Orrell *v.* Coppock, 26 Law Jour. Ch. 269; Aiken *v.* Cheeseborough, 1 Hill, Law (So. Car.) 172, *contra* Wood *v.* Wheelock, 25 Barb. (N. Y.) 625.

[1] Pillans *v.* Van Mierop, 3 Burr. 1663; Townsley *v.* Sumrall, 2 Peters, 182; Spaulding *v.* Andrews, 48 Pa. St. 411; Jones *v.* Council Bluffs Bank, 34 Ill. 313; O'Donnell *v.* Smith, 2 E. D. Smith (N. Y.) 124; Mason *v.* Dousay, 35 Ill. 424; Van Reimsdyck *v.* Kane, 1 Gallison C. C. 633; Leonard *v.* Mason, 1 Wend. 522; Grant *v.* Shaw, 16 Mass.

nal party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought, makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz: an absence of prior liability on the part of the defendant or his property."[1] The doctrine here announced in terms, that in order to bring the promise within the statute, there must be an absence of liability on the part of the promisor, except such as arises from his express promise, is based upon the soundest reason, and affords an explanation for many cases which could not otherwise be sustained upon principle. This doctrine is also applicable where the promise is to pay what the promisor was previously liable for jointly with others only; as in the case of a partnership, where the verbal promise of one partner to pay the partnership debt, is valid.[2] But a promise by a firm to pay the individual debt of one partner;[3] or by a stockholder of a corporation to pay its debts,[4] must be in writing; because in neither case is there any pre-existing liability on the part of the promisor to pay.

§ 55. **New consideration passing between promisee and promisor, will not alone take promise out of statute.**—In many of the

341; Strohecker v. Cohen, 1 Spears, (So. Car.) 349; Nelson v. First National Bank of Chicago, 48 Ill. 36; Shields v. Middleton, 2 Cranch C. C. 205; Pike v. Irwin, 1 Sand. (N. Y.) 14.

[1] Fitzgerald v. Dressler, 7 Com. B. (J. Scott) N. S. 374, per Cockburn, C. J. To this principle may be referred Williams v. Leper, 2 Wils. 308; *Id.* 3 Burr, 1886; Bampton v. Paulin, 4 Bing. 264; Thomas v. Williams, 10 Barn. & Cress. 664; Houlditch v. Milne, 3 Esp. 86; see, also, as further illustrating this point, Macrory v. Scott, 5 Wels., Hurl. & Gor. 907; Nelson v. Boynton, 3 Met. (Mass.) 396; Chambers v. Robbins, 28 Conn. 544; Hoover v. Morris, 3 Ohio, 56; and also cases heretofore cited on other branches of this subject.

[2] Stephens v. Squire, 5 Modern, 205; Aikin v. Duren, 2 Nott & McCord, (So. Car.) 370; Files v. McLeod, 14 Ala. 611; Howes v. Martin, 1 Esp. 162; Rice v. Barry, 2 Cranch C. C. 447.

[3] Taylor v. Hillyer, 3 Blackf. (Ind.) 433; Wagnon v. Clay, 1 A. K. Marsh, (Ky.) 257.

[4] Trustees of Free Schools v. Flint, 13 Met. (Mass.) 539; Wyman v. Gray, 7 Harris & Johns. (Md.) 409; Rogers v. Waters, 2 Gill & Johns. (Md.) 64.

cases which have held a verbal promise to answer for another binding when the original debtor also remained bound, great stress has been laid upon the fact that the promise was founded upon a new consideration moving between the creditor and the promisor, and the promise has been decided to be not within the statute for that reason alone. In a celebrated case, often cited to sustain this position, a most learned judge[1] said that "when the promise to pay the debt of another" arose "out of some new and original consideration of benefit or harm moving between the newly contracting parties," the promise was not within the statute. Numerous cases have been decided upon the authority of this statement of the law; and it has been given as a reason for the decision of many cases which may well rest upon other grounds. The proposition of the learned judge was not necessary to a decision of the case in which it was laid down, and, as stated by him, cannot be supported on principle, nor by the later and best considered authorities. There must be a consideration for every contract of suretyship or guaranty, and to hold that in every case where the consideration moves from the creditor to the surety or guarantor, the promise is not within the statute, would be to repeal the statute altogether in a very large class of cases. If such were the law, the verbal promise of a surety or guarantor made in consideration of the payment to him of one dollar by the creditor, would be valid if the promise was to pay a still subsisting debt of the principal, amounting to a thousand dollars, or any greater sum. When the consideration passes between the surety or guarantor and the creditor, the promise will be within the statute, or not according to circumstances, but there must be some other circumstance besides the mere passage of the consideration to take the case out of the statute. In determining whether any particular case is within or without the statute, the true question is "What is the promise?" not "What is the consideration?" An able court has said: "We believe it will be found that in all the cases now regarded as sound where it has been held that a parol promise to pay the debt of another is binding, the promisor held in his hands funds, securities, or property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty growing out of the receipt of such

[1] Kent, C.J., (afterwards Chancellor), in Leonard v. Vredenburgh, 8 Johns. 29.

fund."[1] In another case in which this question was involved, the court said: "It must be admitted that the cases respecting the application of the Statute of Frauds are greatly confused and irreconcilable with each other. Upon no subject perhaps has there been more diversity of judicial decision. The value of the statute is everywhere admitted, and its language is plain, but in the supposed justice of a particular case a court has often lost sight of the exact rule prescribed by the legislature. As much ingenuity has been expended in efforts to take individual cases out of the statute, as was formerly devoted to avoiding the Statute of Limitations, and in these ingenious efforts principles have been asserted, which, if sound, practically deny all effect to the expressed will of the legislature. Happily, there are glimmerings of late of a tendency to return to a plainer reading of the act, and to give to it a construction more consonant to the apparent mind of the legislature. * Without attempting any extended review of them [the authorities] we think certain principles may be safely considered as settled, or if not settled, sustained by reason and the authority of the best considered adjudications. It is not true, as a general rule, that a promise to pay the debt of another is not within the statute, if it rests upon a new consideration passing from the promisee to the promisor. A new consideration for a new promise is indispensable without the statute, and if a new consideration is all that is needed to give validity to a promise to pay the debt of another, the statute amounts to nothing; nor can it make any difference that the new consideration moves from the promisee to the promisor. The object of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and to these all suits upon verbal contracts to answer for another's debt or default, are equally exposed, no matter whence the consideration of the contract proceeded, or to whom it passed."[2]

§ 56. **Promise not within statute when main object is to**

[1] See elaborate opinion of Poland, C. J., in which he sustains the views expressed in the text, Fullam *v.* Adams, 37 Vt. 391.

[2] Per Strong J. in Maule *v.* Bucknell, 50 Pa. St. 39. Kingsley *v.* Balcome, 4 Barb. (N. Y.) 131; Cross *v.* Richardson, 30 Vt. 647; Floyd *v.* Harrison, 4 Bibb, (Ky.) 76; Lampson *v.* Hobart, 28 Vt. 700; Noyes *v.* Humphreys, 11 Gratt. (Va.) 636; Barber *v.* Bucklin, 2 Denio, 45; De Colyar on Guarantees, p. 141; Kelsey *v.* Hibbs, 13 Ohio St. 340. See, also, on this subject, Price *v.* Trusdell, 28 New Jer. Eq. (1 Stew.) 200.

them, but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than other agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them, and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." In determining this same question, another court[1] said: "A guaranty, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him the negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt, or duty, which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. * Suppose a factor agrees by parol to sell for cash, but gives a credit. His promise is virtually that he will pay the amount of the debt he thus makes. Yet who would say his promise is within the statute? The amount of the argument for the defendant would seem to be that an agent for making sales, or, indeed, a collecting agent, cannot by parol undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes in incidentally as a measure of damages."

[1] Wolff v. Koppel, 5 Hill, 458, per Cowen, J.; affirmed by Court of Errors, and same doctrine enunciated, Wolff v. Koppel, 2 Denio, 368.

§ 58. **Promise not within statute unless made to party to whom principal is liable.**—In order to bring the promise to answer for another within the Statute of Frauds, the promise must be made to the person to whom the other is already, or is thereafter to become, liable. A verbal promise to a debtor himself to pay or furnish him the means of paying his debt, is not within the statute.[1] In a leading case on this subject the plaintiff was liable to one Blackburn on a note, and the defendant, upon sufficient consideration, promised the plaintiff to pay the note to Blackburn: Held, the promise was not within the statute.[2] The court said: "If the promise had been made to Blackburn, doubtless the statute would have applied. It would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz: the debtor, and not to the creditor, the statute not having, in terms, stated to whom the promise contemplated by it, is to be made. But upon consideration, we are of opinion that the statute applies only to promises made to the person to whom another is answerable." A owned a thrashing machine, upon which he owed a balance to B. One C purchased the machine of A, and paid him a certain sum, and verbally promised A to pay B the amount A owed him on the machine, as part of the purchase money to be paid by C to A. Held, the promise was not within the statute.[3] A having a judgment against B, placed a warrant for his arrest in the hands of a bailiff, with instructions that he might take half the amount in satisfaction of the judgment. The bailiff being about to arrest B, one C verbally promised the bailiff to pay him half the judgment, or surrender B by the next Saturday, but did neither. Held, the

[1] Colt v. Root. 17 Mass. 229; Thomas v. Cook, 8 Barn. & Cress. 728; Morin v. Martz, 13 Minn. 191; Love's Case, 1 Salk. 28; Mersereau v. Lewis, 25 Wend. 243; Howard v. Coshow, 33 Mo. 118; Weld v. Nichols, 17 Pick. 538; Pratt v. Humphrey, 22 Conn. 317; Barber v. Bucklin, 2 Denio, 45; North v. Robinson, 1 Duvall (Ky.) 71; Jones v. Hardesty, 10 Gill. & Johns. 404; Aldrich v. Ames, 9 Gray, 76. Preble v. Baldwin, 6 Cush. 549; Fiske v. McGregory, 34 New Hamp. 414; Pike v. Brown, 7 Cush. 133; Soule v. Albee, 31 Vt. 142; Alger v. Scoville, 1 Gray, 391; Gregory v. Williams, 3 Meriv. 582.

[2] Per Lord Denman, in Eastwood v. Kenyon, 11 Adol. & Ell. 438; *Id.* 3 Perry & Dav. 276.

[3] Crim v. Fitch, 53 Ind. 214.

promise was not within the statute. The court said: "It has been distinctly settled, that to bring the promise within the statute, the promisee must be the original creditor. * The debts are totally distinct debts, as well as the debtor's."[1] In another case, deciding the same thing as those already stated, the court said: "The statute applies only to promises made to the persons to whom another is already or is to become answerable. It must be a promise to be answerable for a debt of, or a default in, some duty by that other person towards the promisee."[2]

§ 59. **False representations of another's credit not within statute.**—False and deceitful verbal representations as to the standing and responsibility of a third person, are not within the Statute of Frauds.[3] Such representations cannot, with any regard for the ordinary meaning of language, be held a "special promise" to answer for another. However much they may be within the mischief of the statute, they are clearly not within its language. In the leading case on this subject, one Freeman "falsely, deceitfully and fraudulently" asserted and affirmed, orally, that one Falch "was a person safely to be trusted and given credit to." The court held, upon great consideration, that Freeman was liable to an action in consequence of these representations.[4] In discussing and approving this case, another court said:[5] "The case went, not upon any new ground, but upon the application of a principle of natural justice long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence. The only plausible objection to it is, that in its application to this case it comes within the mischiefs which gave rise to the Statute of Frauds, and that therefore the repre-

[1] Reader *v.* Kingham, 13 Com. B. (J. Scott) N. S. 344, per Earle, C. J.

[2] Parke B. in Hargreaves *v.* Parsons, 13 Mees. & Wels. 561.

[3] Eyre *v.* Dunsford, 1 East, 318; Allen *v.* Adington, 7 Wend. 9; Haycraft *v.* Creasy, 2 East, 92; Warren *v.* Barker, 2 Duvall, (Ky.) 155; Benton *v.* Pratt, 2 Wend. 385; Tapp *v.* Lee, 3 Bos. & Pul. 367; Wise *v.* Wilcox, 1 Day, (Conn.) 22; Foster *v.* Charles, 6 Bing. 396; Hart *v.* Tallmadge, 2 Day, (Conn.) 381; Patten *v.* Gurney, 17 Mass. 182; Russell *v.* Clark, 7 Cranch, 69; Gallagher *v.* Brunel, 6 Cowen, 347; Ewins *v.* Calhoun, 7 Vt. 79; Weeks *v.* Burton, 7 Vt. 67. Lord Eldon was strongly opposed to this doctrine, and thought it not good law. See Evans *v.* Bicknell, 6 Vesey, Jr. 174.

[4] Pasley *v.* Freeman, 3 Term R. 51.

[5] Upton *v.* Vail, 6 Johns. 181, per Kent, C. J.

sentation ought to be in writing. But this, I apprehend, is an objection arising from policy and expediency, for it is certain that the Statute of Frauds, as it now stands, has nothing to do with the case." A statute has been passed in England, providing that no action shall be brought to charge any person by reason of any representations concerning the credit, ability, etc., of another, unless the representations are in writing;[1] and a similar statute has been enacted in several of the United States. When the verbal representation was also accompanied by a verbal promise to pay the debt of the third party, concerning whom the representation was made, the party making the representation has still been held liable. Thus, the representation and promise were "that one Leo was a good man, and might be trusted to any amount; that the defendant durst be bound to pay for the said Leo; and that if Leo did not pay for the goods, he would." It was objected that the injury might have arisen from a violation of the promise to pay, and that the action could not be maintained because of the Statute of Frauds, but the defendant was held liable.[2] The court said: "There never was a time in the English law when an action might not have been maintained against the defendant for this gross fraud. * There is no proof that the plaintiff ever considered the defendant as his debtor, or ever called upon him for the money, or relied upon his promise in the least degree. In the next place, we must suppose every man to know the law, and if the plaintiff was acquainted with the law, he must have known that the defendant's promise was worth nothing, and could have given no credit to him upon it. He cannot have considered it in any other light than as a mode of expression by which the defendant intended more strongly to express his opinion of Leo's circumstances."

§ 60. **Promise in substance to pay debt of another, no matter what its form, is within statute.**—When the promise is not in form, but is in substance, to pay the debt of another, it is

[1] Ninth Geo. IV. chap. 14, § 6. For decisions on this subject, see Lyde *v.* Barnard, Tyrwh. & Gr. 250; Tatton *v.* Wade, 18 Com. B. 370; Haslock *v.* Fergusson, 7 Ad. & Ell. 86; Norton *v.* Huxley, 13 Gray, 285; Kimball *v.* Comstock, 14 Gray, 508; Mann *v.* Blanchard, 2 Allen, 386; McKinney *v.* Whitney, 8 Allen, 207; Huntington *v.* Wellington, 12 Mich. 11. See, also, on this subject, Browne on Frauds, pp. 169-177.

[2] Hamar *v.* Alexander, 5 Bos. & Pul. 241, per Sir James Mansfield. See, also, Thompson *v.* Bond, 1 Camp. 4.

within the statute. Thus, the defendant requested the plaintiff to sell a third person goods, and promised to indorse his note at six months for the price. Held, the promise was within the statute, and could not be enforced.[1] The court, after saying that the promise was to become the third person's surety, proceeded: "To say then that this is not in effect to answer for their debt, would be a sacrifice of substance to sound. It would be devising a formulary by which, through the aid of a perjured witness, a creditor might get round and defraud the statute. He may say 'You did not promise to answer the debt due to me from A, but only to put yourself in such a position that I could compel you to pay it.' Pray where is the difference except in words? According to such reasoning, unless you recite the words of the statute in your undertaking, it will not reach the case. No legislative provision would be worth anything upon such a construction." In another case the plaintiff had contracted to supply goods to A, to be paid for in cash on each delivery. A being desirous of obtaining the goods on credit, the defendant, who had an interest in the performance of the work upon which the goods were to be used, promised the plaintiff that if he would supply the goods to A, upon a month's credit, and allow him, the defendant, a certain per cent. upon the amount of the invoice, he would pay him, the plaintiff, cash, and take A's bill without recourse. Held, the promise was within the statute.[2] The court said: "A contract to give a guaranty, is required to be in writing as much as a guaranty itself. * This is in substance an engagement by which the buyers of goods are not to be exonerated, but the defendant is to indemnify the seller against their default." A verbal promise to procure some one else to sign a guaranty for certain freight, has been held not to be within the statute.[3] There

[1] Per Cowen, J. in Carville v. Crane, 5 Hill, 483; see, also, Gallagher v. Brunel, 6 Cowen, 346; Taylor v. Drake, 4 Strobh. (So. Car.) 431; Pike v. Irwin, 1 Sandf. (N. Y.) 14; Quin v. Hanford, 1 Hill, 82; Wakefield v. Greenhood, 29 Cal. 597; but see D'Wolf v. Rabaud, 1 Peters, 476.

[2] Per Pollock C. B. in Mallet v. Bateman, Law Rep. 1 C. P. 163; S. C. 16, J. Scott N. S. 530; to similar effect, see Martin v. England, 5 Yerg. (Tenn.) 313; Thomas v. Welles, 1 Root (Conn.) 57. In Fitch v. Gardenier, 2 Albott's Rep. Omitted Cas. 153 a suit was pending, which one of the parties wished to compromise, but his attorney promised, if he would go on to make no charge for his services unless he was successful. Held, this was not a collateral undertaking or guaranty of collection, and need not be in writing to bind the attorney making it.

[3] Bushnell v. Beavan, 1 Bing.

the promise was that the creditor should have, not the promisor's, but a third person's guaranty for the debt. It has also been held, that a promise by one who owes a party about to be sued by another, that he will not pay without giving notice to the party about to sue, so that he may have an opportunity to attach the debt, is not within the statute.[1] The same thing has been held where one who receipted for attached property promised that it should be returned upon demand.[2] In these two last cases the promise was in effect to turn over to the creditor the debtor's own property, and not that of the promisor; and in none of the three last mentioned cases was the promise to pay the debt, and in case of a breach the debt would not have been the measure of damages.

§ 61. **Promise to answer for future liability of third party is within the statute.**—If the future primary liability of a third person to the promisee is contemplated as the foundation of the promise, then the promise is within the statute precisely the same as if the liability had existed when the promise was made. The distinction was at one time made, that if there was no existing liability on the part of the third person when the promise was made, it was not within the statute, because there was nothing to which it was collateral.[3] This distinction has, however, long been overruled, and the law settled as above stated.[4] Thus, the defendant and A came to the plaintiff's warehouse and agreed upon a parcel of goods for A, and the defendant said he would guaranty the payment. A afterwards came alone, and ordered other goods, when the plaintiff sent to the defendant, and asked him whether he would engage for A. The defendant replied: "You may not only ship that parcel, but one, two or three thousand pounds more, and I will pay you if he does not." The plaintiff, relying on this promise, afterwards delivered the goods to A. Held, the promise was within the statute.[5] The court said: "Before the case of Jones *v.* Cooper, I thought there was a solid distinction between an undertaking after credit given and an original under-

N. C. 103; *Id.* 4 Moore & Scott, 622.

[1] Towne *v.* Grover, 9 Pick. 306.

[2] Marion *v.* Faxon, 20 Conn. 486.

[3] Per Lord Mansfield, in Mowbray *v.* Cunningham, Hilary Term. 1773, cited in Jones *v.* Cooper, 1 Cowp. 227.

[4] Jones *v.* Cooper, 1 Cowp. 227; Matson *v.* Wharam, 2 Term R. 80; Mallet *v.* Bateman, Law Rep. 1 C. P. 163.

[5] Peckham *v.* Faria, 3 Douglas, 13, per Lord Mansfield. But see Whitman *v.* Bryant, 49 Vt. 512.

taking to pay, and that in the latter case, the surety being the object of the confidence, was not within the statute; but in Jones *v.* Cooper, the court was of opinion that wherever a man is to be called upon only in the second instance, he is within the statute; otherwise, where he is to be called upon in the first instance." In another case, the defendant verbally authorized the plaintiffs, who were merchants, to let a third person have a certain amount of goods, and promised that he would guaranty the payment. The plaintiffs afterwards delivered the goods to the third person, and charged them on their books to the defendant, for the third person. Held, the promise was to answer for the debt of another, and that it could not be enforced for want of writing.[1]

§ 62. **Promise within statute if any credit given to third person.**—If the party to whom goods are delivered, or for whose benefit a service is performed, incur thereby a debt so that he is liable at all, then the undertaking of another, in aid of his liability and collateral to it, must be in writing to be binding, although the collateral undertaking may have been the principal inducement to the delivery of the goods, or the performance of the service.[2] A landlord to whom rent was due gave a warrant to A to distrain upon the tenant. The defendant, who was a creditor of the landlord, paid the broker that valued the goods, and put the plaintiff on the premises to keep possession of the goods, and promised to pay him his charges, and also to repay him certain

[1] Kinloch *v.* Brown, 2 Spear's Law, (So. Car.) 284; see, to same effect as text, Cahill *v.* Bigelow, 18 Pick. 369; Caperton *v.* Gray, 4 Yerg. (Tenn.) 563; Ware *v.* Stephenson, 10 Leigh, (Va.) 155; *Ex parte* Williams, 4 Yerg. (Tenn.) 579; Noyes *v.* Humphreys, 11 Gratt. (Va.) 636; Tilleston *v.* Nettleton, 6 Pick. 509; Taylor *v.* Drake, 4 Strobh. (So. Car.) 431; Newell *v.* Ingraham, 15 Vt. 422; Huntington *v.* Harvey, 4 Conn. 124; Leland *v.* Creyon, 1 McCord, (So. Car.) 100; Puckett *v.* Bates, 4 Ala. 390; Peabody *v.* Harvey, 4 Conn. 119.

[2] Walker *v.* Richards, 39 New Hamp. 259; Matson *v.* Wharam, 2 Term R. 80; Cahill *v.* Bigelow, 18 Pick. 369; Anderson *v.* Hayman, 1 H. Black, 120; Chase *v.* Day, 17 Johns. 114; Brunton *v.* Dullens, 1 Foster & Fin. 450; Bresler *v.* Pendell, 12 Mich. 224; Brady *v.* Sackrider, 1 Sandf. (N. Y.) 514; Hill *v.* Raymond, 3 Allen, 540; Larson *v.* Wyman, 14 Wend. 246; Elder *v.* Warfield, 7 Harr & Johns. (Md.) 391; Darlington *v.* McCunn, 2 E. D. Smith, (N. Y.) 411; Conolly *v.* Kettlewell, 1 Gill. (Md.) 260; Hanford *v.* Higgins, 1 Bosw. (N. Y.) 441; Bushee *v.* Allen, 31 Vt. 631; Allen *v.* Scarff, 1 Hilton, (N. Y.) 209; Steele *v.* Towne, 28 Vt. 771; Dixon *v.* Frazee, 1 E. D. Smith, (N. Y.) 32; Boykin *v.* Dohlonde, 1 Sel. Cas. Ala. 502. See, also, as to collateral promise, Glidden *v.* Child, 122 Mass. 433.

sums to be advanced to another. Held, the promise was within the statute, on the ground that the landlord was responsible as principal for the necessary expenses of the distress, and consequently the promise was to pay the debt of another.[1] It makes no difference that the promisee relied principally upon the promisor; if the third party is at all liable to him, to do the same thing, the promise is within the statute. A contractor who was building a house for the defendant, employed the plaintiff to furnish the stone, but failed to pay him. The defendant promised the plaintiff that if he would go on and finish the work, he would pay him; but the contractor was not discharged from his liability to the plaintiff. Held, the promise was within the statute.[2] So, where the plaintiff had contracted to deliver a quantity of rock to a third person at an agreed price, and before the delivery of the same the plaintiff made known to the defendant his determination not to deliver the rock upon the credit of such third person, and the defendant thereupon said to the plaintiff: "You bring the rock, and I will see you paid for it." The court held the promise was within the statute.[3] In these cases, and indeed in most of the cases on this subject, the promise of the proposed surety or guarantor was principally relied upon by the promisee, and formed the inducement upon which he acted. When, by reason of the statute, the promisor does not become liable, no relief can be granted against him in equity, although he is proceeding against the promisee at law, in direct violation of his promise.[4] When credit is given to two jointly, and they are both principals, the statute does not apply to their engagement.[5]

§ 63. **When promise is original or collateral, cases holding it original.**—It is apparent that the question "to whom was the credit given?" often becomes highly important. If the credit is given to the promisor alone, his promise need not be in writing. But if credit is given to a third person, to any extent, and the promise is collateral to the liability of such third person, it must be in writing. The solution of this question is frequently a matter of great difficulty, and no general rule which will serve as a

[1] Colman v. Eyles, 2 Starkie, 62.

[2] Gill v. Herrick, 111 Mass. 501.

[3] Doyle v. White, 26 Me. 341.

[4] Phelps v. Garrow, 8 Paige, Ch. 322.

[5] Gibbs v. Blanchard, 15 Mich. 292; Wainwright v. Straw, 15 Vt. 215; Hetfield v. Dow, 3 Dutch. (N. J.) 440; *Ex parte* Williams, 4 Yerg. (Tenn.) 579.

test, can be given. In each case, the "expressions used, the situation of the parties, and all the circumstances of the case, should be taken into consideration."[1] It has been held that a promise "to be the paymaster" of one who should render services to another, was an original promise, and not within the statute, but that if the words were "to see him paid," it was collateral, and within the statute.[2] Where the defendant inquired of the plaintiff the terms on which he would let C, his nephew, have newspapers to sell, and on being told the terms, said: "If my nephew calls for the papers, I will be responsible for the papers he shall take," it was held that this was an original and absolute contract on the part of the defendant, and not within the statute.[3] An order was: "Please give the bearer, Henry Fink, the goods which he will select, not exceeding over five hundred and fifty dollars, on my account." Goods having been delivered to Fink on the order, it was held that the writer of the order was liable as principal, and not as guarantor.[4] If goods are sold on the credit of the promisor alone, his promise to pay for them need not be in writing, even though they are delivered to a third person.[5] In an important case on this subject, the plaintiff had been employed by a local board of health to construct a main sewer. Notice had been given to the owners of certain private houses, to connect their house drains with this sewer within a certain time. The plaintiff having been requested by the overseer to make these connections, asked who would pay him for it, when the defendant, who was chairman of the board, said: "Go on, Mountstephen, and do the work, and I will see you paid," it was held that, taking all the circumstances into consideration, the defendant was liable as principal, and his promise was not within the statute.[6] The court said: "In this case, seeing that the parties knew that the board was not liable, and that the plaintiff would

[1] Elder *v.* Warfield, 7 Harr. & Johns. (Md.) 391.

[2] Watkins *v.* Perkins, 1 Ld. Raym. 224; see, also, Skinner *v.* Conant, 2 Vt. 453; Thwaits *v.* Curl, 6 B. Mon. (Ky.) 472; Briggs *v.* Evans, 1 E. D. Smith, (N. Y.) 192; Jones *v.* Cooper, 1 Cowp. 227; Bates *v.* Starr, 6 Ala. 697; Matson *v.* Wharam, 2 Term R. 80.

[3] Chase *v.* Day, 17 Johns. 114.

[4] Neberroth *v.* Riegel, 71 Pa. St. 280.

[5] McCaffil *v.* Radcliff, 3 Robertson, (N. Y.) 445.

[6] Mountstephen *v.* Lakeman, Law Rep. 7 Q. B. 196, per Willes, J.; see, also, Smith *v.* Rudhall, 3 Foster & Fin. 143; Jefferson County *v.* Slagee, 66 Pa. St. 202; Edge *v.* Frost, 4 Dow. & Ry. 243; Hiltz *v.* Scully, 1 Cinc. 554.

not go on unless he had the board or the defendant liable, and did not care to have the defendant liable if the board was liable, the facts seem to exclude, and the jury might well find that they excluded, the notion of the defendant becoming surety for a liability either past, present or future, upon the part of the board; and they might look upon the defendant's contract as a contract to pay, whether the board have been, or shall be, liable or not. Do that work now, and you shall be paid for that work; so that it is a case of principal liability." In another case, the promisor introduced a third person to an upholsterer, and asked him if he had any objection to supplying such third person with some furniture, and that if he would, he, the promisor, "would be answerable," and that "he would see it paid at the end of six months." Held, this was an original undertaking, as principal, on the part of the promisor. The court said: "Whether the contract was original or collateral, viz: whether it was binding on the parties to pay in the first instance and at all events, or only binding in case the other does not, will depend on the contract between the parties. I think that the expressions, 'I'll be answerable,' and 'I'll see you paid,' are equivocal expressions. And then we ought to look to the circumstances to see what the contract between the parties was. * It was left to the jury to say whether he was the original debtor, and they found that he was. I think the jury warranted in that finding. My opinion is founded substantially on the facts of the case, and not on the equivocal expressions, as I consider the words capable of being explained by other circumstances."[1]

§ 64. **Whether promise original or collateral is question of fact—Evidence—Cases holding promise collateral.**—The manner in which the transaction is entered in the creditor's books, often has a controlling influence in determining the question, "To whom was the credit given"? The fact that the charge on

[1] Simpson *v.* Penton, 2 Cromp. & Mees. 430, per Bayley, B. See further, on this subject, Payne *v.* Baldwin, 14 Barb. (N.Y.) 570; Dixon *v.* Hatfield, 2 Bing. 439; Smith *v.* Hyde, 19 Vt. 54; Clancy *v.* Piggott, 4 Nev. & Mann. 496; Sinclair *v.* Richardson, 12 Vt. 33; Birkmyr *v.* Darnell, 1 Salk. 27; *Id.* 2 Ld. Raym. 1085; Turton *v.* Burke, 4 Wis. 119; Austen *v.* Baker, 12 Modern, 250; Hazen *v.* Bearden, 4 Sneed, (Tenn.) 48; Hetfield *v.* Dow, 3 Dutch, (N. J.) 440; Gordon *v.* Martin, Fitzgibbon, 302. As to when guaranty is sufficiently ambiguous to admit of parol evidence to explain it, see Goldshede *v.* Swan, 1 Wels. Hurl. & Gor. 154.

the creditor's books was to a third party has been held to control an absolute promise to pay, and to show that the liability of the promisor was only collateral.[1] If the creditor makes out a bill to the third party, and presents it to him in the first instance, this is strong evidence to show that the credit was given to him, and that the promisor was only collaterally liable.[2] But it is not conclusive evidence of that fact, and may be controlled by other circumstances.[3] These various facts are matters of evidence, tending more or less to show to whom the credit was given, and will be received against the plaintiff to establish that the credit was given to a third person, but they are not evidence in favor of the plaintiff to charge the defendant, for that would be to permit the plaintiff to manufacture evidence for himself.[4] An instance where the promisor was held only collaterally liable, and not bound without writing, was as follows: A first lieutenant in the navy, serving on board a ship, requested the plaintiff, a tailor and slopseller, to supply the crew of the ship with clothing, and at the same time said: "I will see you paid at the pay-table; are you satisfied"? The plaintiff replied, "Perfectly so." The clothing was delivered on board the ship, and the lieutenant compelled several of the sailors who did not want clothes to take them. The court thought the slopseller relied upon the power of the lieutenant to stop the money out of the sailors' pay, and not upon his personal liability, and viewed as a controlling circumstance that the amount due for the clothing was so large that it could not have been expected that the lieutenant would be able to liquidate it out of his pay.[5] So where the promisor, upon being asked to become responsible for goods to be furnished a third person, replied: "You may send them, and I'll take care that they are paid for at the time," it was held that under the circum-

[1] Anderson v. Hyman, 1 H. Black, 120; Matson v. Wharam, 2 Term, 80. On same subject see Conolly v. Kettlewell, 1 Gill, (Md.) 260; Leland v. Creyon. 1 McCord, (So. Car.) 100; Dixon v. Frazee, 1 E. D. Smith, (N. Y.) 32. The fact that a certain person is charged on the plaintiff's book with goods, is not conclusive evidence that the credit was given to him, Swift v. Pierce, 13 Allen, 136.

[2] Storr v. Scott, 6 Car & Payne, 241; Pennell v. Pentz, 4 E. D. Smith, (N. Y.) 639; Larson v. Wyman, 14 Wend. 246.

[3] Mountstephen v. Lakeman, Law Rep. 7 Q. B. 196.

[4] Cutler v. Hinton, 6 Rand. (Va.) 509; Walker v. Richards, 41 New Hamp. 388; Noyes v. Humphreys, 11 Gratt. (Va.) 636; Kinloch v. Brown, 1 Rich, (So. Car.) 223.

[5] Keate v. Temple, 1 Bos. & Pul. 158.

stances he was only collaterally liable, and not bound unless his promise was in writing.[1] In another case, the plaintiff, an innkeeper, had furnished a dinner for a public celebration, under the direction of a committee of which the defendant was a member. It was the understanding that every person should pay for his own dinner. The defendant was captain of a military company which took dinner upon that occasion. While the servants of the plaintiff were collecting the pay, the defendant told them they need not call upon the members of the military company, as he would be responsible for them. Held, the promise was collateral, and within the Statute of Frauds.[2] From the examples which have been given, it is clear that the words made use of by the parties cannot alone be relied upon to show to whom the credit was given. It is a question of fact to be found by the jury in each particular case, and in its determination, not only the language made use of, but also the situation and surroundings of the parties, and every other fact and circumstance bearing upon the question should be taken into consideration.

§ 65. **If original promise in writing, verbal subsequent promise takes case out of statute of limitations—Verbal guaranty sufficient to support verbal account stated.**—If the Statute of Frauds has once been satisfied by writing, a new verbal promise will be sufficient to take the case out of the Statute of Limitations. Thus the defendant, having entered into a guaranty in writing, and become liable upon it more than six years before the commencement of the suit, verbally promised, within six years, that the matter should be arranged: Held, he was liable. The Statute of Frauds was satisfied by the guaranty having been originally in writing. In order to take a case out of the Statute of Limitations, the new promise need not be in writing. The two statutes, the one requiring a writing, and the other not, should not be confounded.[3] It has been held that if a person who has verbally guarantied the price of goods sold, afterwards verbally promise to pay for them, he is liable on an account stated. Thus the defendant verbally undertook to see the plaintiff paid for goods supplied by him to A, at the defendant's request. After the goods had been supplied, and A had made default in payment, the defendant verbally acknowledged his liability under

[1] Rains v. Story, 3 Car. & Payne, 130.
[2] Tileston v. Nettleton, 6 Pick. 509.
[3] Gibbons v. McCasland, 1 Barn. & Ald. 690.

the guaranty, and promised to pay the plaintiff the price of the goods. The court said, that while the statement of an account and promise to pay could give no cause of action if the obligation on which it was founded never could have been enforced at law; yet here, there was a clear legal liability under the guaranty which the Statute of Frauds did not vacate or annul, but rendered incapable of being enforced for want of legal evidence, and it was sufficient, under the authorities, to support a statement of account.[1]

§ 66. **The form of the writing.**—The statute proceeds "unless the agreement or some memorandum or note thereof shall be in writing." From the use of the words "some memorandum or note thereof," the design seems to have been to dispense with formalities in the writing required. The agreement, memorandum or note, must substantially express the real transaction, but the form in which it is expressed, is wholly immaterial. It may be in the form of a letter[2] of a receipt[3] of an order[4] of the return of a sheriff upon an execution[5] of a vote of a corporation entered on its books[6] or in any other form provided it expresses the substance of the transaction. It is not necessary that it should consist of a single paper. Several letters or papers which on their face refer to each other, may be taken together to make a complete agreement, note or memorandum.[7] But it is well settled, that in order that the several papers may be read together, they must on their face refer to each other, and that their mutual relation cannot be shown by parol evidence.[8] There are,

[1] Wilson *v.* Marshall, 15 Irish Com. Law Rep. 466.

[2] Saundersen *v.* Jackson, 2 Bos. & Pul. 238; Foster *v.* Hale, 3 Vesey, Jr. 696; Western *v.* Russell, 3 Vesey & Bea. 187; Allen *v.* Bennet, 3 Taunt. 169; Brettel *v.* Williams, 4 Wels. Hurl. & Gor. 623.

[3] Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21; Ellis *v.* Deadman, 4 Bibb (Ky.) 466.

[4] Lerned *v.* Wannemacher, 9 Allen, 412.

[5] Nichol *v.* Ridley, 5 Yerg. (Tenn.) 63; Barney *v.* Patterson, 6 Harr. & Johns. (Md.) 182; Elfe *v.* Gadsden, 2 Rich (So. Car.) 373; Hanson *v.* Barnes, 3 Gill & Johns. (Md.) 359.

[6] Tufts *v.* Plymouth Gold Mining Co. 14 Allen, 407; Chase *v.* Lowell, 7 Gray, 33.

[7] Jackson *v.* Lowe, 1 Bing. 9; Allen *v.* Bennet, 3 Taunt. 169; Jones *v.* Post, 6 Cal. 102; Owen *v.* Thomas, 3 Myl. & Keen, 353; Simons *v.* Steele, 36 New Hamp. 73; Huddleston *v.* Briscoe, 11 Vesey, 583; Salmon Falls Manf. Co. *v.* Goddard, 14 How. (U. S.) 446; Wilson Sewing Machine Co. *v.* Schnell, 20 Minn. 40; Learned *v.* Wannemacher, 9 Allen, 412; Tallman *v.* Franklin, 14 New York, 584; Chapman *v.* Bluck, 5 Scott, 515; Parkhurst *v.* Van Cortland, 14 Johns. 15.

[8] Jacob *v.* Kirk, 2 Moody & Rob.

however, a few cases which seem to countenance a contrary doctrine.[1] A writing which is signed by the party to be charged, may be read together with one which is not signed.[2] If, when all the papers which refer each other are read together, the terms of the contract are doubtful, they are not sufficient to satisfy the statute.[3] The agreement note or memorandum may be written with ink or pencil, or may be printed or stamped,[4] and it may be executed at the time the contract is made, or at any subsequent time before the suit is brought.[5]

§ 67. **The whole promise must appear from the writing.**—Whatever the form of the writing may be, and whether it consist of one or more parts, all the essential terms of the contract (unless, perhaps, the consideration,) must appear from it, and parol evidence cannot be introduced to aid it.[6] Thus, in a letter written by the defendant to the plaintiff, relating to a proposed mortgage, but which did not itself say anything about the mortgage, the following words were used: "I will take any responsibility myself respecting it, should there be any." Held, the de-

221; Clinan *v.* Cooke, 1 Schoales & Lefroy, 22; Moale *v.* Buchanan, 11 Gill & Johns. (Md.) 314; Wiley *v.* Roberts, 27 Mo. 388; Morton *v.* Dean. 13 Met. (Mass.) 385; Boardman *v.* Spooner, 13 Allen, 353; Freeport *v.* Bartol, 3 Greenl. (Me.) 340; Nichols *v.* Johnson, 10 Conn. 192; Abeel *v.* Radcliff, 13 Johns. 297; Ide *v.* Stanton, 15 Vt. 685; O'Donnell *v.* Leeman, 43 Me. 158; Adams *v.* McMillan, 7 Port. (Ala.) 73; Blair *v.* Snodgrass, 1 Sneed (Tenn.) 1; Boydell *v.* Drummond, 11 East, 142; Wilkinson *v.* Evans, Law Rep. 1 C. P. 407.

[1] Allen *v.* Bennet, 3 Taunt. 169; Salmon Falls Manf. Co. *v.* Goddard, 14 How. (U. S.) 446. See, also, Bird *v.* Blosee, 2 Vent. 361; Johnson *v.* Dodgson, 2 Mees. & Wels. 653.

[2] De Beil *v.* Thomson, 3 Beav. 469; Gale *v.* Nixon, 6 Cow. (N. Y.) 445; Coles *v.* Trecothick, 9 Vesey, 234; Dodge *v.* Van Lear, 5 Cranch (C. C.) 278; Western *v.* Russell, 3 Vesey & Bea. 187; Toomer *v.* Dawson, Cheves (So. Car.) 68; Saunderson *v.* Jackson, 3 Esp. 180.

[3] Brodie *v.* St. Paul, 1 Vesey, Jr. 326; Boydell *v.* Drummond, 11 East, 142.

[4] Draper *v.* Pattani, 2 Spears (So. Car.) 292; Schneider *v.* Norris, 2 Maule & Sel. 286; Vielie *v.* Osgood, 8 Barb. (N. Y.) 130; Saunderson *v.* Jackson, 2 Bos. & Pul. 238; Jacob *v.* Kirk, 2 Moody & Rob. 221; M'Dowell *v.* Chambers, 1 Strobh. Eq. (So. Car.) 347; Geary *v.* Physic, 5 Barn. & Cres. 234; Clason *v.* Bailey, 14 Johns. 484; Pitts *v.* Beckett, 13 Mees. & Wels. 743.

[5] Williams *v.* Bacon, 2 Gray, 387; Sievewright *v.* Archibald, 17 Ad. & Ell. N. S. 103. As to the matters treated of in this section, see, at greater length, Browne on Frauds, Chap. 17.

[6] Stearns *v.* Hall, 9 Cush. 31; Hall *v.* Soule, 11 Mich. 494; Bryan *v.* Hunt, 4 Sneed, 543; Whittier *v.* Dana, 10 Allen, 326; Cummings *v.* Arnold, 3 Met. (Mass.) 486.

fendant was not bound.[1] The court said the whole promise must appear from the writing, and proceeded: "The letter, if read by itself, without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning; it evidently refers to previous conversations, in which these particulars are supplied. The whole promise, therefore, is not in writing, as the statute requires that it should be." So, where under certain shipping articles of two seamen, and under the word "sureties," a party signed his name, it was held he was not liable; because, while it appeared that he was a surety, it did not appear what his agreement was, nor for what he became surety.[2] The court said: "The memorandum ought to state substantially what the undertaking of the surety is." The writing must identify, with reasonable certainty, both the contracting parties, but only the party sought to be charged need sign it.[3] Thus the defendant signed, and handed to T the following document: "Sir, I beg to inform you that I shall see you paid the sum of 800*l.* for the ensuing building which you undertake to build for T." He intended it to be handed by T as a guaranty to J, who was then negotiating with T to erect for him the building referred to. T having agreed with the plaintiff instead of J that the plaintiff should erect the building, delivered the document to him without the defendant's knowledge or authority. The defendant afterward heard of and ratified this delivery. Held, the defendant was not liable, because the writing did not contain the name of the person for whom it was intended. The court said: "It is essential to the validity of any such agreement, or memorandum thereof, that it should contain the names of both parties to the agreement. It is true that there is no necessity that both parties should sign it. * But it must still contain all the essentials of an agreement, and therefore

[1] Holmes *v.* Mitchell, 7 J. Scott, (N. S.) 361, per Williams, J.

[2] Dodge *v.* Lean, 13 Johns. 508.

[3] Champion *v.* Plummer, 1 Bos. & Pul. (N. R.) 252; Waterman *v.* Meigs, 4 Cush. 497; Jacob *v.* Kirk, 2 Moody & Rob. 221; Sherburne *v.* Shaw, 1 New Hamp. 157; Farwell *v.* Lowther, 18 Ill. 252; Nichols *v.* Johnson, 10 Conn. 192; Wheeler *v.* Collier, Moo. & Mal. 123; Webster *v.* Ela, 5 New Hamp. 540; Allen *v.* Bennet, 3 Taunt. 169; Sheid *v.* Stamps, 2 Sneed (Tenn.) 172.

inter alia the names of both parties. * In this very case, supposing the guaranty to be valid, it might have been put into the hands of some person for whom the defendant never intended it, and an attempt might have been made on the one hand to enforce, and on the other to resist it, by parol evidence as to who was the person really intended."[1] If it appears from the writing, with reasonable certainty, for whom it is intended, it is sufficient. The payee of a promissory note, payable to bearer, signed the following guaranty on its back: "In consideration of * I hereby guaranty the payment of the within note." The court said a guaranty must indicate the person for whom it was intended, either by name, or as one of a class, and as the guaranty referred to the note, it should be read with it, and it was therefore payable to the bearer, whoever he might be, and was valid.[2] With reference to a general letter of credit, it has been said that it "is addressed to any and every person, and therefore gives to any person to whom it may be shown, authority to advance upon its credit. A privity of contract springs up between him and the drawer of the letter, and it becomes, in legal effect, the same as if addressed to him by name."[3] In such case the writer of the letter is liable to the party making the advances. It has also been held that the mere fact that the name of the plaintiff appears in the writing is not sufficient, unless such name also appears from the writing to be that of the promisee, or party to whom the defendant is liable.[4] The subject matter of the contract must appear from the writing, but it may be expressed in general terms, and parol evidence is admissible to identify it.[5]

[1] Williams *v.* Lake, 2 Ell. & Ell. 349, per Cockburn, C. J. As to the matters treated of in this section, see more fully, Brown on Frauds, Chap. 18.

[2] Palmer *v.* Baker, 23 Up. Can. C. P. R. 302; to the same general effect, see Thomas *v.* Dodge, 8 Mich. 51; Nevius *v.* Bank of Lansingburgh, 10 Mich. 547.

[3] Union Bank *v.* Costers' Exrs. 3 New York, 203, per Pratt, J. Holding to same effect, see Laurason *v.* Mason, 3 Cranch, 492; Russell v. Wiggins, 2 Story Rep. 214; Adams *v.* Jones, 12 Peters, 207; Duval *v.* Trask, 12 Mass. 154; Birckhead *v.* Brown, 5 Hill. 634; Carnegie *v.* Morrison, 2 Met. Mass. 381.

[4] Bailey *v.* Ogden, 3 Johns. 399; Vanderbergh *v.* Vandenbergh, Law Rep. 1 Exch. 316.

[5] Bateman *v.* Phillips, 15 East, 272; Sale *v.* Darragh, 2 Hilton, (N. Y.) 184; Hall *v.* Soule, 11 Mich. 494; Nichols *v.* Johnson, 10 Conn. 198; Atwood *v.* Cobb, 16 Pick. 227; Hurley *v.* Brown, 98 Mass. 545; McMurray *v.* Spicer, Law R. 5 Eq. 527; Baumann *v.* James, Law R. 3 Ch. App. 508; Horsey *v.* Graham, Law R. 5 Com. P. 9.

§ 68. **Whether the consideration must appear from the writing.**—The common law required, as necessary to the validity of every contract not under seal, that it be supported by a sufficient consideration. It was just as necessary that there should be a consideration for the contract to pay the debt of another, after, as before, the passage of the Statute of Frauds.[1] The statute did not dispense with anything which was before essential to the validity of a contract; on the contrary, it added something in the case of a promise to pay the debt of another, by requiring it to be in writing, when before no writing was necessary. Under the portion of the statute now under consideration, an important question has arisen, which has been the occasion of great contrariety of decision; the question being, whether or not it is necessary that the agreement, or memorandum, or note thereof, need express the consideration for the promise as well as the promise itself. It was firmly settled by the English courts that the writing must express the consideration for the promise,[2] when the Mercantile Law Amendment Act was passed.[3] Among other things this act provides that "no special promise to be made by any person after the passing of this act to be answerable for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding, to charge the person by whom such promise shall have been made, by reason only that

[1] Barrell *v.* Trussell, 4 Taunt. 117; Leonard *v.* Vredenburgh, 8 Johns. 29; Saunders *v.* Wakefield, 4 Barn. & Ald. 595; Aldridge *v.* Turner, 1 Gill. & Johns. (Md.) 427; Tenny *v.* Prince, 4 Pick. 385; Pillan *v.* Van Mierop, 3 Burr, 1663; Clark *v.* Small, 6 Yerg. (Tenn.) 418. See on this subject, Krutz *v.* Stewart, 54 Ind. 178.

[2] The leading case holding this doctrine is Wain *v.* Warlters, 5 East, 10, decided in 1804. The correctness of this decision was denied by Lord Eldon in *Ex parte* Minet, 14 Vesey, 189, and *Ex parte* Gordon, 15 Vesey, 286, and was doubted in other cases. See Phillipps *v.* Bateman, 16 East, 356; Goodman *v.* Chase, 1 Barn. & Ald. 297. The question was again directly presented in Saunders *v.* Wakefield, 4 Barn. & Ald. 595, and the court unanimously held that the consideration must appear from the writing. After that decision, the question was considered settled. See Jenkins *v.* Reynolds, 6 Moore, 86; *Id.* 3 Broderip & Bing. 14; Raikes *v.* Todd, 8 Adol. & Ell. 846; Sweet *v.* Lee, 3 Man. & Gr. 452; Morley *v.* Boothly, 3 Bing. 107; Bainbridge *v.* Wade, 16 Ad. & Ell. N. S. 89; Hawes *v.* Armstrong, 1 Bing. N. C. 761; James *v.* Williams, 3 Nev. & Man. 196; Cole *v.* Dyer, 1 Cro. & Jer. 461; Clancy *v.* Piggott, 4 Nev. & Man. 496.

[3] 19 and 20 Victoria C. 97, sec. 3.

the consideration for such promise does not appear in writing or by necessary inference from a written instrument." While the Statute of Frauds has been generally re-enacted in the United States, it has not, in all cases, been done in the words of the original statute. In those states where the original wording is retained, some have decided that the consideration must, and others, that it need not, be expressed in the writing. In the states where the word "promise" has been coupled with the word "agreement," it is generally held that the writing need not express the consideration.[1] In several of the states the statute provides in terms whether or not the consideration shall be expressed in the writing. It would probably subserve no useful purpose to attempt a review of the American cases, with reference to ascertaining on which side of this question the preponderance

[1] Of the states where the word "agreement" is retained, as in the original statute, it has been held that the consideration must appear from the writing; in Georgia, Henderson *v.* Johnson, 6 Ga. 390; Hargroves *v.* Cooke, 15 Ga. 321; in Indiana, Gregory *v.* Logan, 7 Blackf. 112—(since changed by statute); in Maryland, Sloan *v.* Wilson, 4 Harr. & Johns. 322; Hutton *v.* Padgett, 26 Md. 228; Elliott *v.* Giese, 7 Harr. & Johns. 457; Edelen *v.* Gough, 5 Gill. 103; in Michigan Jones *v.* Palmer, 1 Doug. 379; in New Hampshire, Underwood *v.* Campbell, 14 New Hamp. 393; Neelson *v.* Sanborn, 2 New Hamp. 413; in New Jersey, Buckley *v.* Beardslee, 2 South. 572; Laing *v.* Lee, Spencer, 337; in New York, Sears *v.* Brink, 3 Johns. 210; Kerr *v.* Shaw, 13 Johns. 236; Castle *v.* Beardsley, 10 Hun. 343; in South Carolina, Stephens *v.* Winn, 2 Nott, & McC. 372; but see Lecat *v.* Tavel, 3 McCord, 158; and in Wisconsin, Taylor *v.* Pratt, 3 Wis. 674. On the other hand, it has been held that the consideration need not appear from the writing; in Connecticut, Sage *v.* Wilcox, 6 Conn. 81; in Maine, Levy *v.* Merrill, 4 Greenl. 180; Gilligan *v.* Boardman, 29 Me. 81; in Massachusetts, Packard *v.* Richardson, 17 Mass. 122—(since changed by statute); in Missouri, Bean *v.* Valle, 2 Mo. 103; Halsa *v.* Halsa, 8 Mo. 303; Little *v.* Nabb, 10 Mo. 3; in North Carolina, Miller *v.* Irvine, 1 Dev. & Bat. 103; Ashford *v.* Robinson, 8 Ired. 114; in Ohio, Reed *v.* Evans, 17 Ohio, 128; and in Vermont, Smith *v.* Ide, 3 Vt. 290; Patchin *v.* Swift, 21 Vt. 292; Gregory *v.* Gleed, 33 Vt. 405. Where the word "promise" is coupled with the word "agreement," it has been held that the consideration need not be expressed; in Alabama, Thompson *v.* Hall, 16 Ala. 204; in California, Baker *v.* Cornwall, 4 Cal. 15; Evoy *v.* Tewksbury, 5 Cal. 285; Ellison *v.* Jackson, 12 Cal. 542; in Florida, Dorman *v.* Executor of Richard, 1 Florida, 281; in Kentucky, Ratliff *v.* Trout, 6 J. J. Marsh, 606; in Mississippi, Wren *v.* Pearce, 4 Smedes & Mar. 91; in Tennessee, Taylor *v.* Ross, 3 Yerg. 330; Campbell *v.* Findley, 3 Humph. 330; Gilman *v.* Kibler, 5 Humph. 19; in Texas, Ellett *v.* Britton, 10 Tex. 208; and in Virginia, Colgin *v.* Henley, 6 Leigh, 85

of authority lies. It may be here remarked that when the writing is under seal, no consideration need be expressed in it. The seal itself imports a consideration, and is sufficient to satisfy the statute.[1]

§ 69. **Reasons why the consideration should appear from the writing—Observations.**—One of the reasons given for holding that the consideration must appear from the writing is, that according to its strict legal meaning, the word "agreement" includes the whole contract between the parties, and among other things, the consideration as well as the promise; and that the words "memorandum or note thereof" relate to the word "agreement," and were intended to, and do, dispense with nothing, unless, perhaps, matters of form. This seems to be a solid ground upon which to rest this interpretation of the statute. As already seen, it is generally held by the courts, even those which hold that the consideration need not be expressed, that all the other essential terms of the contract must appear from the writing. The consideration is not strictly a part of the promise of the party to be charged, but is something which moves from others, and is the inducement to him for making the promise. The consideration is, however, a part of the contract, and if the word "agreement" means the same as the word "contract," then the original Statute of Frauds required that it should appear from the writing. Another reason, much relied upon, is that if the consideration was allowed to be proved by parol, it would open the door to all the evils which the Statute of Frauds was designed to remedy. This is not true in point of fact. The agreement is in words; the consideration is usually something material, which is more susceptible of proof, and less liable to mistake, than the words of the contract. There seems to be no more danger of perjury in allowing the consideration for the promise to pay the debt of another to be proved by parol, than in allowing the consideration for any other contract to be proved in the same way. The same objection would exclude oral evidence from every case. The rule that the consideration must appear from the writing was a great hardship on the commercial world, and produced much more fraud than it prevented. Recognizing this fact, the English parliament, and the legislatures of several of the United States, have express-

[1] Douglass *v.* Howland, 24 Wend. 35; Rosenbaum *v.* Gunter, 2 E. D. Smith (N. Y.) 415; McKensie, *v.* Farrell, 4 Bosw. (N. Y.) 192.

ly provided by statute that the written promise to pay the debt of another, need not express the consideration, and the results, so far from being disastrous, have proved highly satisfactory.

§ 70. **When the consideration sufficiently appears from the writing.**—In the courts holding that the consideration must appear from the writing, it is not necessary that such consideration be formally and precisely expressed. It is sufficient if it appear by necessary implication from the terms of the written instrument. The rule is thus well expressed: "It would undoubtedly be sufficient, in any case, if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it that such, and no other, was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute; but there must be a well-grounded inference, to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other consideration, was intended by the parties as the ground of the promise.[1] A guaranty was as follows: "I guaranty the payment of any goods, which J. Stadt delivers to J. Nichols." Held, it sufficiently appeared that the delivery of the goods was the consideration for the promise.[2] The same thing was held when the words were as follows: "Sir, I will be accountable to you for the payment, within six months, of the

[1] Hawes v. Armstrong, 1 Bing. (N. C.) 761, per TINDAL, C. J. For cases in which it was held that the consideration sufficiently appeared from the writing, and which illustrate this subject, see Grant v. Hotchkiss, 26 Barb. (N. Y.) 63; Boehm v. Campbell, 8 Taunt. 679; Shortrede v. Check, 1 Adol. & Ell. 57; Gorrie v. Woodley, 17 Irish Com. Law Rep. 221; Bainbridge v. Wade, 16 Adol. & Ell. (N. S.) 89; Hoad v. Grace, 7 Hurl. & Nor. 494; Lysaght v. Walker, 5 Bligh, (N. R.) 1; *Id.* 2 Dow & Clark, 211; Broom v. Batchelor, 1 Hurl. & Nor. 255; Oldershaw v. King, 2 Hurl. & Nor. 517; Staats v. Howlett, 4 Denio, 559; Boehm v. Campbell, 3 Moore, 15; Jarvis v. Wilkins, 7 Mees. & Wels. 410; White v. Woodward, 5 Man. Gr. & Scott, 810; Caballero v. Slater, 14 Com. B. (5 J. Scott) 300; Edwards v. Jevons. 8 Man. Gr. & Scott, 436; Pace v. Marsh, 1 Bing. 216; *Id.* 8 Moore, 59; Johnston v. Nicholls, 1 Man Gr. & Scott, 251; Church v. Brown, 21 New York, 315; Williams v. Ketchum, 19 Wis. 231; Stead v. Liddard, 8 Moore, 2; Russell v. Moseley, 3 Brod. & Bing. 211; Dutchman v. Tooth, 5 Bing. (N. C.) 577; *Id.* 7 Scott, 710; Emmott v. Kearns, 5 Bing. (N. C.) 559; Göttsberger v. Radway, 2 Hilton, (N. Y.) 342.

[2] Stadt v. Lill, 9 East, 348.

seed order forwarded by my son" (naming him.)[1] The same thing was held, when the guaranty was in these words: "Mr. Clark, of this place, will purchase a small stock of cloths and clothing of you, which I hope you will sell to him cheap, and I have no doubt he will make you a valuable customer. I hereby guaranty the collection of any amount, which you may credit him with, not exceeding two thousand dollars."[2] In another case, the writing was as follows: "I do hereby agree to become surety for R. G., now your traveler, in the sum of 500*l* for all money he may receive on your account." Held, it sufficiently appeared that the consideration for the undertaking was the continuation of the traveler in the service of his employers.[3] The same thing was held for the same reason when the words were: "I hereby guarantee to you the sum of 250*l* in case Mr. P. should make default in the capacity of agent and traveler to you."[4] Where the writing was: "I hold myself responsible to * (plaintiffs) to the amount of $2,000, for any drafts they have accepted or may hereafter accept for John Latouche," it was held that it sufficiently appeared, that in consideration that the plaintiffs would accept for Latouche, the defendant agreed to be responsible.[5] In another case, the words were: "I agree to be security to you for J. C., late in the employ of J. P., for whatever you may entrust him with while in your employ, to the amount of 50*l*." Held, the consideration sufficiently appeared. It might fairly be implied that J. C. had left one service, and that the guaranty was given in consideration of his being taken into another.[6] The insertion of the words "for value received," in the writing, are a sufficient expression of the consideration to satisfy the statute.[7] When a guaranty under seal expressed a consideration of one dollar in hand paid to the guarantor, it was

[1] Nash *v.* Hartland, 2 Irish Law Rep. 190.

[2] Eastman *v.* Bennett, 6 Wis. 232.

[3] Ryde *v.* Curtis, 8 Dow. & Ry. 62.

[4] Kennaway *v.* Treleavan, 5 Mees. & Wels. 498.

[5] Hutton *v.* Padgett, 26 Md. 228.

[6] Newbury *v.* Armstrong, 6 Bing. 201; *Id.* 3 Moore & Payne, 509; *Id.* Moody & Malkin, 389.

[7] Day *v.* Elmore, 4 Wis. 190; Mosher *v.* Hotchkiss, 3 Abb. Rep. Omitted Cas. (N. Y.) 326; *Id.* 2 Keyes, 589; Cheeney *v.* Cook, 7 Wis. 413; Miller *v.* Cook, 23 New York, 495; Douglass *v.* Howland, 24 Wend. 35; Whitney *v.* Stearns, 16 Me. 394; Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516; Howard *v.* Holbrook, 9 Bosw. (N. Y.) 237; Lapham *v.* Barrett, 1 Vt. 247; Connecticut, &c. Ins. Co. *v.* Cleveland R. R. Co. 41 Barb. (N. Y.) 9; Brewster *v.* Silence, 8 New York, 207; Martin *v.* Hazard Powder Co., 2 Colorado, 596.

held that the guaranty was valid and binding, even though the one dollar had never been paid. The court said, that in order to invalidate the guaranty, it must be shown, not only that the dollar had not been paid, but also that there was no agreement to pay it.[1]

§ 71. **When consideration does not sufficiently appear, or consideration appearing is insufficient—Instances.**—In a case where the writing was as follows: "Inclosed I forward you the bills drawn per J. A. upon and accepted by L. D., which I doubt not will meet due honor, but in default thereof, I will see the same paid;" it was held the consideration did not sufficiently appear.[2] The same thing was held when the words were: "I hereby guaranty to pay W. H., etc., $10 per month until the sum of $300, due by Messrs. B. & H., etc., shall be paid."[3] When the undertaking was: "I hereby undertake to secure to you the payment of any sums of money you have advanced or may hereafter advance to * or on their account with you, commencing the 1st November, 1831, not exceeding 2,000*l*.," it was held that the consideration for the guaranty of the past advances did not sufficiently appear. The court said: "The consideration must either appear on the face of them (guaranties) or by necessary inference from them, for unless this is the case parol evidence is not excluded. The terms of the instrument do not lead to any clear inference that the future advances were, as the declaration alleges, the consideration for guarantying the bygone advances."[4] A guaranty was: "Bill Oct. 2d, 1844, $1,306.29. I hereby agree to guaranty the payment of U. & Co.'s note for the above amount, in favor of * payable nine mos. after date thereof." Held, it plainly expressed a past consideration, and was void for that reason.[5]

[1] Childs *v.* Barnum, 11 Barb. (N. Y.) 14. It has been held that if the consideration expressed was a fictitious one, it was sufficient. Happe *v.* Stout, 2 Cal. 460.

[2] Hawes *v.* Armstrong, 1 Bing. (N. C.) 761; *Id.* 1 Scott, 661.

[3] Palsgrave *v.* Murphy, 14 Up. Can. C. P. R. 153.

[4] Raikes *v.* Todd, 1 Perry & Dav. 138; *Id.* 8 Adol. & Ell. 846.

[5] Weed *v.* Clark, 4 Sandf. (N.Y. Superior Ct.) 31. For cases holding that the consideration is not sufficiently expressed, or that an insufficient consideration is expressed, and illustrating this point, see Morley *v.* Boothby, 3 Bing. 107; *Id.* 10 Moore, 395; James *v.* Williams, 5 Barn. & Adol. 1109; Church *v.* Brown, 29 Barb. (N.Y.) 486; Bushell *v.* Beavan, 1 Bing. N. C. 103; Allnutt *v.* Ashenden, 5 Man. & Gr. 392; *Id.* 6 Scott N. R. 127; Spicer *v.* Norton, 13 Barb. (N.Y.) 542; Bell *v.* Welch,

§ 72. **When writing ambiguous, it may be explained by parol evidence.**—When the words of the writing are ambiguous, and may be construed to express a past or a future consideration, parol evidence of the situation and surroundings of the parties at the time the contract was made, may be given in order to arrive at a true interpretation of the language employed by them. Thus a writing was: "As there was no time set for the payment of your account, and Mr. J. thought it would be an accommodation to him to have you wait until * if that will answer your purpose, I will be surety for the payment," etc: Held, the words "your account" were ambiguous, and might as well mean "your account to be made," as "your account already made;" that parol evidence was admissible to show it was for an account to be made, and that the writing sufficiently expressed the consideration.[1] So, where the words were: "In consideration of E. R. & Co. giving credit to D. G., I hereby engage to be responsible to, and pay any sum not exceeding 120*l*. due to E. R. & Co. by D. J.," parol evidence of extrinsic circumstances, was admitted to show that the words, "giving credit," were intended to apply to a certain credit which had been agreed upon, and it was held that the writing disclosed a sufficient consideration.[2] When the words were: "In consideration of your being in advance" to the third party, parol evidence was admitted to show that at the time the writing was executed, no advance had been made.[3] The same thing was held when the words were: "In consideration of your having advanced,"[4] and in both cases the consideration was held to be sufficiently expressed. Where the words were: "I hereby guaranty B's account with A," and it was shown by parol that there was a pre-existing account to which the words could apply, it was held that the guaranty was void for want of a sufficient consideration.[5]

9 Man. Gr. & Scott, 154; Bewley *v.* Whiteford, Hayes (Irish Rep.) 356; Wain *v.* Warlters, 5 East, 10; Lees *v.* Whitcomb, 5 Bing. 34; James *v.* Williams, 3 Nev. & Man. 196; Sykes *v.* Dixon, 9 Adol. & Ell. 693; Bentham *v.* Cooper, 5 Mees. & Wels. 621; Price *v.* Richardson, 15 Mees. & Wels. 539; Cole *v.* Dyer, 1 Cromp. & Jer. 461; Jenkins *v.* Reynolds, 3 Brod. & Bing. 14.

[1] Walrath *v.* Thompson, 4 Hill, 200.

[2] Edwards *v.* Jevons, 8 Man. Gr. & Scott, 436.

[3] Haigh *v.* Brooks, 10 Adol. & Ell. 309.

[4] Goldshede *v.* Swan, 1 Wels. Hurl. & Gor. 154.

[5] Allnutt *v.* Ashenden, 5 Man. & Gr. 392. For cases further illustrating

§ 73. **When several papers may be read together to express consideration for promise.**—It is not necessary that the consideration should be expressed in the writing which contains the promise. If it appears from any other writing which is so referred to in that which contains the promise, as to become a part of it, this is sufficient. Thus, the plaintiff having pressed W for payment of a debt, the defendant, who was W's attorney, sent to the plaintiff a bill accepted by W, at two months, enclosed in a letter in which the defendant said: "W, being disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I send you his acceptance at two months." The plaintiffs refused to take the bill unless the defendant put his name to it. Whereupon the defendant wrote upon the back of the letter: "I will see this bill paid for W." The court said that reading all the papers together, the promise was that "in consideration of your forbearing to sue W for two months, I will pay the bill if he fails to do so," and the defendant was held liable.[1] Certain parties executed a contract as agents for another, and at the same time executed a guaranty of the contract, but the guaranty did not express a consideration. Held, that the guaranty and contract being contemporaneous, were all one transaction, and should be read together; and a sufficient consideration was expressed in the contract to sustain the guaranty.[2] A, by letter, in which the consideration sufficiently appeared, entered into an agreement with B, and B became a party to the engagement by writing a few lines at the bottom of a copy of A's letter. C became guarantor for B to A by an indorsement on the back of this copy of A's letter, in which indorsement reference was made to the terms of the agreement on the other side. In an action on the guaranty, it was held that the reference in the indorsement to the terms of the agreement was a sufficient memorandum of the consideration to satisfy the Statute of Frauds.[3]

this subject, see Butcher *v.* Steuart, 11 Mees. & Wels. 857; Lysaght *v.* Walker, 5 Bligh. N. R. 1; Singley *v.* Cutter, 7 Conn. 291; Shortrede *v.* Cheek, 1 Adol. & Ell. 57; Arms *v.* Ashley, 4 Pick. 71; Thornton *v.* Jenyns, 1 Man. & Gr. 166; Wood *v.* Beach, 7 Vt. 522; Steele *v.* Hoe, 14 Adol. & Ell. N. S. 431; Smith *v.* Ide, 3 Vt. 290; Bainbridge *v.* Wade, 16 Adol. & Ell. N. S. 89; D'Wolf *v.* Rabaud, 1 Peters, 476.

[1] Emmott *v.* Kearns, 5 Bing. N. C. 559; *Id.* 7 Scott, 687.

[2] Jones *v.* Post, 6 Cal. 102.

[3] Stead *v.* Liddard, 1 Bingham, 196; for further cases to similar effect, see Simons *v.* Steele, 36 New Hamp. 73;

But where a valid written contract to pay for stock deliverable at a future day was signed by the buyer, and at the same time, and as an express condition of the seller's making the bargain, the defendant indorsed on the same paper: "I guaranty the within contract," the guaranty was held void because it did not express a consideration. The court said the contracts could not be read together because they were not executed by the same parties. The one was a promise to pay absolutely, the other only in case of the default of the principal, etc.[1]

§ 74. **Whether guaranty of note must express consideration.**—Whether the guaranty of a promissory note must, in order to be valid, express a consideration, has been differently decided by different courts, and sometimes, by the same court. Thus, at the time a note was made, and on the same piece of paper, a guarantor wrote under the note: "I hereby guaranty the payment of the above note." Held, the guaranty was void, because it expressed no consideration.[2] The court said the two contracts were entirely different in their nature, and between different parties, and could not be read together. A party agreed to become surety on an overdue promissory note, under seal, and because there was no room at the bottom of the note for his signature, indorsed his name in blank on its back. He was held not liable.[3] The court said: "The indorsement in blank of a note not negotiable is not such written evidence of a promise to pay as the statute (of frauds) requires." A guaranty indorsed on a promissory note at the time of its execution, as follows: "We guaranty the payment of the within note," was held void, because it did not express a consideration.[4] Where a stranger to a note before its de-

Wilson Sewing Machine Co. v. Schnell, 20 Minn. 40; Coldham v. Showler, 3 Man. Gr. & Scott, 312; Hanford v. Rogers, 11 Barb. (N. Y.) 18; Adams v. Bean, 12 Mass. 139; Brettel v. Williams, 4 Wels. Hurl. & Gor. 623; Bailey v. Freeman, 11 Johns. 221; Coe v. Duffield, 7 Moore, 252; Lecat v. Tavel, 3 McCord (So. Car.) 158; Union Bank v. Coster's Exr. 3 New York, 203; Dorman v. Bigelow, 1 Fla. 281; Colbourn v. Dawson, 10 Com. B. (1 J. Scott) 765.

[1] Draper v. Snow, 20 New York, 331; to similar effect, see Hutson v. Field, 6 Wis. 407; Otis v. Haseltine, 27 Cal. 80.

[2] Brewster v. Silence, 8 New York, 207. This case overruled Manrow v Durham, 3 Hill, 584, which held to the contrary. Brewster v. Silence was followed and approved in Glen Cove Mut. Ins. Co. v. Harrold, 20 Barb (N. Y.) 298. To similar effect, see Hunt v. Brown, 5 Hill, 145; Hall v. Farmer, 5 Denio, 484.

[3] Wilson v. Martin, 74 Pa. St. 159.

[4] Lock v. Reid, 6 Up. Can. Q. B. R. (O. S.) 295.

livery indorsed it in blank, it was held that he was a guarantor, and his guaranty was void, because it did not express a consideration.[1] On the other hand, when a party was paid a money consideration for guarantying a note already executed by the principals, and in execution of his contract to guaranty indorsed his name in blank on the back of the note, it was held that it sufficiently expressed the consideration.[2] The court said that under the circumstances a guaranty or a note might have properly been written over the indorsement, and further: "It is in the nature of a note or bill, and equally so of an indorsement, even in blank, that it imports a consideration the same as a specialty." Where a party indorsed a promissory note, as follows: "I agree to stand security for the payment of the within amount;" it was held that the note and indorsement should be taken together as one instrument, and that they sufficiently expressed the consideration.[3] A married woman executed a promissory note, which contained the words "for value received," and at the same time a stranger wrote below the note, "I hereby guaranty the payment of the above note on maturity." The court said that both instruments having been executed at the same time, should be considered together, and showed a sufficient consideration; but it would have been otherwise if they had been executed at different times.[4]

§ 75. **Signature by party to be charged.**—The statute requires that the writing shall be "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Even though the document is all written by the party to be charged, it must still be signed by him,[5] but need not be sealed.[6] Whether sealing alone is sufficient is an open question, but the better opinion seems to be that it is.[7] A mark by a

[1] Von Doren v. Tjader, 1 Nevada, 380.

[2] Oakley v. Boorman, 21 Wend. 588. This case was subsequently disapproved by the same court; see Brewster v. Silence, 8 New York, 207. To same effect as Oakley v. Boorman, see Fuller v. Scott, 8 Kansas, 25.

[3] Dorman v. Bigelow, 1 Florida, 281.

[4] Nabb v. Koontz, 17 Md. 283.

[5] Hawkins v. Holmes, 1 P.Wms. 770; Barry v. Law, 1 Cranch (C. C.) 77; Selby v. Selby, 3 Meriv. 2; Bailey v. Ogden, 3 Johns. 399; Hubert v. Turner, 4 Scott (N. R.) 486; Anderson v. Harold, 10 Ohio, 399.

[6] Worrall v. Munn, 5 New York, 229; Farris v. Martin, 10 Humph. (Tenn.) 495; Wheler v. Newton, 2 Eq. Cas. 44, c. 5.

[7] Lemayne v. Stanley, 3 Levinz, 1; Worneford v. Worneford, Strange, 764; Gryle v. Gryle, 2 Atkyns, 177;

marksman is a sufficient signature.[1] A printed signature is sufficient, especially when it is subsequently recognized by the party, or where part of the instrument is in his handwriting.[2] A signature by initials is sufficient,[3] and the christian name may be denoted by an initial, or left out altogether.[4] It is doubtful whether the signature of a person mentioned in the writing as a contracting party, but who on the paper professes to sign as a witness, is sufficient.[5] The signature of a party to instructions for a telegraphic message accepting a written offer is sufficient.[6] The signature may be at the top, in the body or at the foot of the writing. There is no restriction in this regard, except that the signature must be so placed as to authenticate the instrument as the act of the person executing it.[7] The rule has been thus well

Grayson *v.* Atkinson, 2 Ves. Sr. 454; Smith *v.* Evans, 1 Wils. 313; Wright Wakeford, 17 Vesey, 454; Cherry*v.* *v.* Heming, 4 Wels. Hurl. & Gor. 631.

[1] Selby *v.* Selby, 3 Merivale, 2; Jackson *v.* VanDusen, 5 Johns. 144; Hubert *v.* Moreau, 12 Moore, 216; Schneider *v.* Norris, 2 Maule & Sel 286; Baker *v.* Dering, 8 Adol. & Ell. 94; Taylor *v.* Dening, 3 Nev. & Per. 228; Morris *v.* Kniffin, 37 Barb. (N.Y.) 336; Barnard *v.* Heydrick, 49 Barb. (N.Y.) 62.

[2] Saunderson *v.* Jackson, 3 Esp. 180; Lerned *v.* Wannemacher, 9 Allen, 412; Schneider *v.* Norris, 2 Maule & Sel. 286; Merritt *v.* Clason, 12 Johns. 102; Commonwealth *v.* Ray, 3 Gray, 441; Vielie *v.* Osgood, 8 Barb. (N.Y.) 130; Davis *v.* Shields, 26 Wend. 341; Pitts *v.* Beckett, 13 Mees. & Wels. 743.

[3] Salmon Falls Man. Co. *v.* Goddard, 14 How. (N. S,) 447; Gorrie *v.* Woodley, 17 Irish Com. Law R. 221; Palmer *v.* Stephens, 1 Denio, 471; Jacob *v.* Kirk, 2 Moody & Rob. 221; Sanborn *v.* Flagler, 9 Allen, 474; Sweet *v.* Lee, 3 Man. & Gr. 452.

[4] Lobb *v.* Stanley, 5 Queen's B. 574.

[5] Welford *v.* Beezeley, 1 Ves. Sr. 6; Gosbell *v.* Archer, 2 Adol. & Ell. 500; Blore *v.* Sutton, 3 Merivale, 237; Coles *v.* Trecothick, 9 Vesey, 234; Hill *v.* Johnston, 3 Ired. Eq. (Nor. Car.) 432.

[6] Godwin *v.* Francis, Law Rep. 5 Com. P. 295; Dunning *v.* Roberts, 35 Barb. (N.Y.) 463. As to whether the name of the party must actually appear, or whether a designation by which he may be identified is sufficient, see Selby *v.* Selby, 3 Merivale, 2; Hubert *v.* Moreau, 12 Moore, 216; Baker *v.* Dering, 8 Adol. & Ell. 94.

[7] Lemayne *v.* Stanley, 3 Levinz. 1; *Id.* Freeman, 538; Fessenden *v.*Mussey, 11 Cush. 127; Holmes *v.* Mackrell, 3 Com. B. (N. S.) 789; Wise *v.* Ray, 3 Greene (Ioa.) 430; Knight *v.* Crockford, 1 Esp. 190; McConnell *v.* Brillhart, 17 Ill. 354; Ogilvie *v.* Foljambe, 3 Merivale, 53; James *v.* Patten, 8 Barb. (N.Y.) 344; Morrison v. Turnour, 18 Vesey, 175; Yerby *v.* Grigsby, 9 Leigh (Va.) 387; Bleakley *v.* Smith, 11 Simons, 150; Davis *v.* Shields, 24 Wend. 322; Propert *v.* Parker, 1 Russ. & My. 625; Draper *v.* Pattani, 2 Spear (So. Car.) 292; Western *v.* Russell, 3 Ves. & Bea. 187; Merritt *v.* Clason, 12 Johns. 102; Penniman *v.* Hartshorn, 13 Mass. 87; Williams *v.* Wood, 16 Md. 220; Hawkins *v.* Chace, 19 Pick. 502; 2 Smith's Leading Cas. p. 249.

stated: "Although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it then stood, or whether he left it so unsigned because he refused to complete it."[1] The statute provides that the writing shall be signed by the "party to be charged therewith." If it is signed by the party to be charged, it is not necessary that it be signed by the other party to the contract, although as already shown, such other party must be designated by it.[2]

§ 76. **Signature by agent.**—The writing may be signed by the party to be charged, or by "some other person thereunto by him lawfully authorized." Generally, any one who may be an agent for any other purpose, may be an agent for signing the writing required by the statute, but neither party can be the agent of the other for this purpose.[3] The same person may act as the agent of both parties. This is illustrated by the familiar case of an auctioneer, who, being the agent of the owner of property, sells it to the highest bidder. He thereupon becomes the agent of such bidder to complete the contract, and by entering his name in the usual place as purchaser, binds him as such.[4]

[1] Johnson *v.* Dodgson, 2 Mees. & Wels. 653, per Lord Abinger, C. B.; Saunderson *v.* Jackson, 2 Bos. & Pul. 238.

[2] Reuss *v.* Picksley, Law Rep. 1 Exch. 342; Clason *v.* Bailey, 14 Johns. 484; Laythoarp *v.* Bryant, 2 Bing (N. C.) 735; Morin *v.* Martz, 13 Minn. 191; Huddleston *v.* Briscoe, 11 Vesey, 583; McCrea *v.* Purmont, 16 Wend. 460; Martin *v.* Mitchell, 2 Jacob & Walk. 413; Douglass *v.* Spears, 2 Nott & McC. (So. Car.) 207; Hatton *v.* Gray, 2 Ch. Cas. 164; Barstow *v.* Gray, 3 Greenl. (Me.) 409; Seton *v.* Slade, 7 Vesey, 265; Shirley *v.* Shirley, 7 Blackf. (Ind.) 452; Fowle *v.* Freeman, 9 Vesey, 351; Allen *v.* Bennett, 3 Taunt. 169; Penniman *v.* Hartshorn, 13 Mass. 87.

[3] Wright *v.* Dannah, 2 Camp. 203; Rayner *v.* Linthorne, 2 Car. & Pa. 124; Sharman *v.* Brandt, 40 Law Jour. N. S. 312; Farebrother *v.* Simmons, 5 Barn. & Ald. 333; Boardman *v.* Spooner, 13 Allen, 353; Robinson *v.* Garth, 6 Ala. 204; Bent *v.* Cobb, 9 Gray, 397. See, also, on this subject, Bird *v.* Boulter, 4 Barn. & Adol. 443; Ennis *v.* Waller, 3 Blackf. (Ind.) 472; Brant *v.* Green, 6 Leigh (Va.) 16.

[4] Morton *v.* Dean, 13 Met. (Mass.) 385; Kenworthy *v.* Schofield, 2 Barn. & Cress. 945; McComb *v.* Wright, 4 Johns Ch. 659; White *v.* Proctor, 4 Taunt. 209; Gill *v.* Bicknell, 2 Cush. 355; Simon *v.* Motivos, 1 W. Blackstone, 599; *Id.* 3 Burrow, 1921; Cleaves *v.* Foss, 4 Greenl. (Me.) 1; Hinde *v.* Whitehouse, 7 East, 558; Anderson *v.* Chick, Bailey Ch. (So. Ca.) 118; Emmerson *v.* Heelis, 2 Taunt. 38; Endicott *v.* Penny, 14 Sm. & Mar. (Miss.) 144; Walker *v.* Constable, 1 Bos. & Pul. 306; Gordon *v.* Sims, 2 McCord, Ch. (So. Car.) 151; Coles *v.* Trecothick, 9

The same is true of public officers, who sell property at auction, such as sheriffs and deputy sheriffs[1] administrators[2] commissioners of court,[3] etc. The authority of the agent may be conferred in the same manner as the authority of any other agent, and even if he have no authority when he sign, his act may be afterwards ratified by the principal by parol.[4] It is not necessary that the agent who signs should be appointed by writing,[5] unless the writing he executes is under seal, when his authority must also be under seal.[6] It is not necessary that the agent should sign the name of the principal to the writing. If he signs his own name, parol evidence will be admitted to prove the agency, and charge the principal.[7]

§ 77. **Pleading.**—In a declaration in a suit against a surety or guarantor, it is not necessary to state that the promise was in writing.[8] This is founded on the general principle that where a

Vesey, 234; Singstack *v.* Harding, 4 Harr. & Johns. 186; Buckmaster *v.* Harrop, 7 Vesey, 341; Smith *v.* Jones, 7 Leigh (Va.) 165; Stansfield *v.* Johnson, 1 Esp. 101; Adams *v.* McMillan, 7 Port. (Ala.) 73; Blagden *v.* Bradbear, 12 Vesey, 466; Browne on Frauds, p. 386.

[1] Robinson *v.* Garth, 6 Ala. 204; Christie *v.* Simpson, 1 Rich. Law (So. Car.) 401; Ennis *v.* Waller, 3 Blackf. (Ind.) 472; Carrington *v.* Anderson, 5 Munf. (Va.) 32; Brent *v.* Green, 6 Leigh (Va.) 16.

[2] Smith *v.* Arnold, 5 Mason (C. C.) 414.

[3] Gordon *v.* Sims, 2 McCord Ch. (So. Car.) 151; Hutton *v.* Williams, 35 Ala. 503; Hart *v.* Woods, 7 Blackf. (Ind.) 568; but the power of an auctioneer, in this regard, is confined to those who act in that capacity; see Anderson *v.* Chick, Bailey Eq. (So. Car.) 118; Batturs *v.* Sellers, 5 Harr. & Johns. (Md.) 117; Sewall *v.* Fitch, 8 Cowen, 215.

[4] Gosbell *v.* Archer, 2 Adol. & Ell. 500; Holland *v.* Hoyt, 14 Mich. 238; Maclean *v.* Dunn, 4 Bing. 722.

[5] Mortlock *v.* Buller, 10 Vesey, 292; Inhabitants of Alna *v.* Plummer, 4 Greenl. (Me.) 258; Rucker *v.* Cammeyer, 1 Esp. 105; McWhorter *v.* McMahan, 10 Paige, 386; Wright *v.* Dannah, 2 Camp. 203; Lawrence *v.* Taylor, 5 Hill, 107; Greene *v.* Cramer, 2 Connor & Law. 54; Hawkins *v.* Chace, 19 Pick. 502; Clinan *v.* Cook, 1 Schoales & Lef. 22; Ulen *v.* Kittredge, 7 Mass. 233; Graham *v.* Musson, 7 Scott, 769; Yerby *v.* Grigsby, 9 Leigh, (Va.) 387; Coleman *v.* Bailey, 4 Bibb (Ky.) 297; Johnson *v.* McGruder, 15 Mo. 365; Johnson *v.* Dodge, 17 Ill. 433.

[6] Blood *v.* Hardy, 15 Me. 61.

[7] Wilson *v.* Hart, 7 Taunt. 295; Dykers *v.* Townsend, 24 New York, 57; Salmon Falls Ins. Co. *v.* Goddard, 14 How. (U. S.) 447; Curtis *v.* Blair, 26 Miss. 309; Yerby *v.* Grigsby, 9 Leigh (Va.) 387; Williams *v.* Woods, 16 Md. 220; Merritt *v.* Clason, 12 Johns. 102; McConnell *v.* Brillhart, 17 Ill. 354; Williams *v.* Bacon, 2 Gray, 387; Pinckney *v.* Hagadorn, 1 Duer. (N. Y.) 89.

[8] Walker *v.* Richards, 39 New Hamp. 259; Lilley *v.* Hewitt, 11 Price, 494; Ecker *v.* McAllister, 45 Md. 290; Macey *v.* Childress, 2 Tenn. Ch. R. (Cooper) 438; Marston *v.* Sweet, 66 New York, 207.

statute makes a writing necessary to a common law matter where it was not so before, in declaring on that matter it is not necessary to state that it is in writing, although it must be proved in evidence; but when the matter is created by statute, and a writing is required, then the pleading must allege the existence of the writing. When it is pleaded that there was no writing, it may be replied generally that there was a writing without setting it out.[1] The fact that there was no writing need not be specially pleaded, but may be taken advantage of under the general issue.[2]

[1] Wakeman v. Sutton, 2 Adol. & Ell. 78.

[2] Mines v. Sculthorpe, 2 Camp. 215; Eastwood v. Kenyon, 3 Perry & Dav. 276.

CHAPTER III.

OF THE LIABILITY OF THE SURETY OR GUARANTOR GENERALLY.

§ 78. **Construction of the contract.**—The first step towards ascertaining the liability of a surety or guarantor, is to determine the meaning of his contract. The rules which should govern in the construction of such contracts are therefore of great importance. It has been said by several courts that a strict construction in favor of the surety or guarantor should be adopted, and all doubts resolved in his favor.[1] The better and generally received opinion, however, is that this contract should be construed the same as any other contract, and that the same rules should be applied to ascertain the true intention of the parties.[2] It has

[1] Nicholson *v.* Paget, 1 Cromp. & Mees. 48; *Id.* 3 Tyr. 164.

[2] Kastner *v.* Winstanley, 20 Up. Can. Com. P. R. 101; White *v.* Reed, 15 Conn. 457; Locke *v.* McVean, 33 Mich. 473; Crist *v.* Burlingame, 62 Barb. (N. Y.) 351.

been said that letters of credit and commercial guaranties should not be construed the same as bonds which are usually entered into with deliberation,[1] but that they "ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and liberal interpretation, so as to attain the object for which the instrument is designed, and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments, generally drawn up by merchants in brief language; sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care, would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world."[2] This whole subject has been thus ably summarized: "In guaranties, letters of credit and other obligations of sureties, the terms used and language employed are to have a reasonable interpretation, according to the intent of the parties, as disclosed by the instrument read in the light of the surrounding circumstances, and the purposes for which it was made. If the terms are ambiguous, the ambiguity may be explained by reference to the circumstances surrounding the parties, and by such aids as are allowable in other cases, and if an ambiguity still remains, I know of no reason why the same rule which holds in regard to other instruments should not apply; and if the surety has left anything ambiguous in his expressions, the ambiguity be taken most strongly against him.[3] This certainly should be the rule, to the extent that the creditor has in good faith acted upon and given credit to the supposed intent of the surety. He is not liable on an implied engagement, and his obligation cannot be extended by construction or implication beyond the precise terms of the instrument by which he has become surety. But in such instruments the meaning of written language is to be ascertained in the same manner and by the same rules as in other instru-

[1] Bell v. Bruen, 1 How. (U. S.) 169, per Catron, J.

[2] Lawrence v. McCalmont, 2 How. (U. S.) 426 per Story, J.

[3] To this effect see, also, Bailey v. Larchar, 5 Rhode Is. 530; Mayer v. Isaac, 6 Mees. & Wels. 605; Mason v. Pritchard, 12 East. 227; Hargreave v. Smee, 6 Bing. 244; Wood v. Priestner, Law Rep. 2 Exch. 66; Hocy v. Jarman, 39 New Jer. Law, (10 Vroom) 523.

ments, and when the meaning is ascertained, effect is to be given to it."[1]

§ 79. **Surety and guarantor favorites in law, and are not chargeable beyond strict terms of their engagement.**—A rule never to be lost sight of in determining the liability of a surety or guarantor, is, that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation, when such terms are ascertained.[2] This is a rule universally recognized by the courts, and is applicable to every variety of circumstances. Its existence has no doubt given rise to many of the expressions used by courts, when they have said that in construing the contract every intendment should be made in favor of the surety or guarantor, when in fact it should have no controlling influence at all on the construction of the contract. As illustrating the view of this rule held by the courts, it has been said: "Where any act has been done by the obligee that may injure the surety, the court is very glad to lay hold of it in favor of the surety."[3] Again: "No principle is more firmly settled in this state than this: that sureties may stand on the very terms of a statutory bond or undertaking. So clearly has this doctrine been announced and acted upon, that it may be regarded as entering into the condition of such an undertaking, that it will not be extended by the courts beyond the necessary import of the words used. It will not be implied that the surety has undertaken to do more or other than that which is expressed in such obligation."[4] Again: "It is now too well settled to admit of doubt, that a guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance of it he has guarantied; that he is in this respect a favorite of the law, and that a claim against him is *strictissimi juris*."[5] Again: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed

[1] Belloni *v.* Freeborn, 63 New York, 383, per Allen, J. On same subject, and to same effect, see Douglass *v.* Reynolds, 7 Peters, (U. S.) 113; Russell *v.* Clark's Exr. 7 Cranch, 69.

[2] People *v.* Chalmers, 60 New York, 154; Chase *v.* McDonald, 7 Harris & Johns, (Md.) 160.

[3] Law *v.* The East India Company, 4 Vesey, 824.

[4] Lang *v.* Pike, 27 Ohio St. 498, per Ashburn J.

[5] Kingsbury *v.* Westfall, 61 New York, 356, per Gray, C.

out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."[1] The principle is clearly stated, and one of the reasons for it given as follows: "It is a well-settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract; and except in certain cases of accident, mistake or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to at law.

* This rule is founded upon the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another in the character of surety or bail, becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed.' It becomes, then, excessively important to have the rule established that a surety is never to be implicated beyond his specific agreement."[2]

§ 80. **Rule that surety is favorite in law, and rules for construing contract must not be confounded—Parties may practically construe contract.**—The rules for construing the contract of a surety or a guarantor, should by no means be confounded with the rule that sureties and guarantors are favorites of the law, and have a right to stand upon the strict terms of their obligations. There is no legal prohibition against entering into a contract of suretyship or guaranty. For any contract which it is legal to make, it is legal that a surety or guarantor shall become responsible. In the construction of the contract of a surety or guarantor, as well as of every other contract, the true question is: What was the intention of the parties, as disclosed by the instrument read in the light of the surrounding circumstances? The contract of the surety or guarantor being just as legal as that of the principal, there is no good reason for holding that in arriving at the intention of the parties, one set of rules shall govern when the principal, and another when the surety or guarantor is concerned.

[1] Miller v. Stewart, 9 Wheaton, 680, per Story J.

[2] Per Kent, C. J. (afterwards Chancellor), in Ludlow v. Simond, 2 Caines' Cas. in Error, 1.

To say that a certain set of words in a contract mean one thing when the principal is defendant, and that the same words in the same contract mean another thing, simply because the defendant is a surety or guarantor, is absurd. The meaning of the words is not affected by the fact that the party sought to be charged is principal, surety or guarantor. On the other hand, a surety or guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. In most cases the consideration moves to the principal, and he would be liable upon an implied contract, while the surety or guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. No implied liability exists to charge him. It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal.[1] Being then bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms, or to permit it to be altered without his consent, would be, not to enforce the contract made by him, but to make another for him. The parties themselves may give a practical construction to a guaranty, and that construction will be enforced. Where a guaranty was such that standing alone it would not have been held to be continuing, but the parties had for some time acted upon it as a continuing guaranty, it was held that it should be so construed. The court said: "We have found no case where the parties have been allowed to repudiate any such long standing and unequivocal practical construction of their contract."[2] Evidence by the clerks of a party to whom a letter of credit was addressed, showing that he understood it to be a continuing guaranty, and acted upon it as such, has been held competent in a suit against the writer of such letter. The court said the evidence was competent to show that advances had been made on the faith of the guaranty, if for no other purpose.[3]

§ 81. **When consideration paid to guarantor not usurious—Measure of damages on guaranty of note.**—The *bona fide* sale of

[1] Winston *v.* Fenwick, 4 Stew. & Port. (Ala.) 269; Harrison *v.* Field, 2 Washington (Va.) 136; Pickersgill *v.* Lahens, 15 Wallace, 140; Pecker *v.* Julius, 2 Browne (Pa.) 31; Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547.

[2] Per Redfield, C. J., in Michigan State Bank *v.* Pecks, 28 Vt. 200.

[3] Douglass *v.* Reynolds, 7 Peters (U. S.) 113.

one's credit by way of guaranty, or by making a note for another's accommodation, though for a consideration exceeding the legal rate of interest, is not usurious if the transaction is not connected with a loan between the parties. "As the law now stands, a man has as good a right to sell his credit as he has to sell his goods or his lands, and if he deal fairly he may take as large a price as he can get for either of them."[1] However small the consideration may be which the guarantor receives, he is liable for the full amount of the debt guarantied, however large, if such be the scope of his contract. Thus, after a note for $7,868.80 had been executed and delivered by the principals, one Oakley, in consideration of $190, agreed to guaranty the payment of the note, and in execution of the agreement indorsed it in blank. Held, he was liable for the full amount of the note. The court said: "It is not for us to hamper Mr. Oakley or any other citizen in such a way as to preclude his making money by insuring the debts of his neighbors. It is enough that he has not been imposed upon."[2] When the guaranty is that there is a certain sum due on a note, the measure of damages is the value of a judgment for that amount, if one had been obtained against the makers. And in such case, when the makers are solvent but the note has been paid, the measure of damages is the full amount guarantied to be due.[3]

§ 82. **When surety may be sued before principal—Property of surety may be first taken on execution against principal and surety.**—Whether a surety or a guarantor becomes liable to suit immediately upon the default of, and before any steps are taken against, the principal, depends in every case upon the terms of his contract. When, by the terms of the contract, the obligation of the surety or guarantor is the same as that of the principal, then as soon as the principal is in default, the surety or guarantor is likewise in default, and may be sued immediately and before any proceedings are had against the principal.[4] This results from the fact that he had a right to contract such a liability, and having done so, he is bound by his engagement. In such case no demand

[1] More *v.* Howland, 4 Denio, 264, per Bronson, C. J.

[2] Oakley *v.* Boorman, 21 Wend. 588, per Cowen, J. To same effect, see Cooper *v.* Page, 24 Me. 73.

[3] Head *v.* Green, 5 Bissell, 311, per Blodgett, J.

[4] Penny *v.* Crane Bros. Man. Co., 80 Ill. 244; Wilson *v.* Campbell, 1 Scam. (Ill.) 493; Redfield *v.* Haight, 27 Conn.

on the principal is necessary.[1] Nor is any demand on the surety or guarantor necessary. The bringing of the suit is a sufficient demand.[2] Nor need unliquidated damages be liquidated by a previous suit against the principal.[3] Where the bond of a deputy treasurer to a treasurer provided that the treasurer should be "kept free from all incumbrances, blame, damage and loss," from any acts of the deputy, the deputy having made default, it was held that the treasurer had a right to recover on the bond against the sureties for such default, although he had not himself paid anything on account thereof.[4] When the surety or guarantor is in default, the creditor is not, before proceeding against him, obliged to exhaust a mortgage which he holds on the property of the principal for the payment of the same debt.[5] "It is clearly competent for a creditor to secure himself both by a lien on property and the engagement of a third person undertaking for the payment by the debtor. And the creditor is not obliged to proceed in equity upon his mortgage, but has the election either to seek a foreclosure or prosecute an action at law upon the promise of the debtor and his surety."[6] A suit against a surety on a note will not be delayed because the principal has been adjudged a bankrupt, and the note has been filed by the payee in the bankruptcy proceedings, and a judgment rendered for his distributive share of the the assets. The surety can himself pay the note, and prove his claim against the estate of the principal.[7] Upon an appropriation by the sheriff of the proceeds of a sale of A's real estate, a judgment against A as the surety of B must be paid in preference to subsequent judgments against A, although it appear

31; Smith v. Rogers, 14 Ind. 224; Ranelaugh v. Hayes, 1 Vernon, 189; Abercrombie v. Knox, 3 Ala. 728; Garey v. Hignutt, 32 Md. 552; Geddis v. Hawk, 1 Watts, (Pa.) 280, overruling Hawk v. Geddis, 16 Serg. & Rawle, 23; Hoey v. Jarman, 39 New Jer. Law (10 Vroom) 523.

[1] Carr v. Card, 34 Mo. 513; Mitchell v. Williamson. 6 Md. 210.

[2] Byrne v. Ætna Ins. Co., 56 Ill. 321; Hough v. Ætna Life Ins. Co. 57 Ill. 318, which were cases of sureties on bonds of insurance agents; Wood v. Barstow, 10 Pick. 368, which was a case of a surety on an executor's bond.

[3] Janes v. Scott, 59 Pa. St. 178.

[4] Baby v. Baby, 8 Up. Can. Q. B. R. 76; to same effect, see Wilson v. Stilwell, 9 Ohio St. 467; Grant v. Hotchkiss, 26 Barb. (N. Y.) 63.

[5] Jones v. Tincher, 15 Ind. 308; New Orleans Canal & Banking Co. v. Escoffie, 2 La. An. 830; Day v. Elmore; 4 Wis. 190; Ranelaugh v. Hayes, 1 Vernon, 189.

[6] Cullum v. Gaines, 1 Ala. 23, per Collier, C. J.

[7] Gregg v. Wilson, 50 Ind. 490.

that the same judgment is a lien upon the real estate of B, which is a sufficient security for its payment. The remedy of the subsequent creditors of A is by subrogation. The holder of the older judgment has a legal right to his money at once, and will not be delayed to benefit other creditors.[1] The State sold certain land to a party, who gave bond with surety for the purchase money. The certificate of purchase provided that in case of default in payment, the premises should "be immediately forfeit and revert to the State." Held, the surety might be sued for the whole purchase money remaining unpaid. The State had an option to enforce the payment of the whole of the purchase money, or to re-sell the land and hold the surety for the balance, if any, which might remain unpaid after such re-sale.[2] After a joint judgment is rendered against principal and surety, the sheriff may collect all the money from the surety.[3] The holder of an execution issued on a judgment against a principal and two sureties, may cause it to be levied on land of one of the sureties, and there being no fraud or collusion, it is no objection to the validity of such levy that it was made at the request of the principal and the other surety and of the holder, who purchased the rights of the judgment creditor with money furnished by the principal and such other surety.[4] When the sureties on a tax collector's bond obligate themselves each for a specific sum, the State is entitled, in case the collector becomes a defaulter to a judgment against each surety for the whole amount for which he is bound, if the defalcation is for so much, although the judgments against the sureties may amount to much more than the defalcation. If judgment was rendered against each surety for only his aliquot part of the defalcation, and one or more of the sureties proved insolvent, the State would lose so much. But no matter how much may be the aggregate of the judgments, no more than the amount of the defalcation can be collected from the sureties.[5] One of the "novels" of Justinian allowed sureties the right to require that before they were sued the principal debtor should, at their

[1] Neff's Appeal, 9 Watts & Serg. (Pa.) 36; see, also, on this subject, Tynt v. Tynt, 2 Peere Wms. 542.

[2] Rush v. The State, 20 Ind. 432.

[3] Keaton v. Cox, 26 Ga. 162; Eason v. Petway, 1 Dev. & Bat. Law, (Nor. Car.) 44. To similar effect, see Northwestern Mut. Life Ins. Co. v. Allis, 23 Minn. 337; Winham v. Crutcher, 2 Tenn. Ch. R. (Cooper) 535.

[4] Taylor v. VanDusen, 3 Gray, 498.

[5] State v. Hampton, 14 La. An. 690; Stetson v. City Bank of N. O. 12 Ohio St. 577.

expense, be prosecuted to judgment and execution. This rule prevails in most of the countries which have adopted the civil law. According to the Roman law before the time of Justinian, the creditor could, as he can by the common law when the surety is in default, apply to the surety first.[1] The common law rule, as above stated, prevails in England, in the United States, where not changed by statute, and in other countries which have adopted the common law.

§ 83. **When guarantor of collection liable—When mortgage on property of principal must be foreclosed before guarantor liable.**—While it is established that a surety or guarantor may be sued as soon as he is in default, it is often difficult to determine when such default has occurred. It has been held that a guaranty of the collection of the debt of another, or that such debt is collectible, means that it is "collectible by due course of law," the same as if those words had been written in the guaranty, and that legal proceedings must be had and exhausted against the parties liable when the guaranty was executed, before a cause of action arises against the guarantor. These cases hold that the prosecution of such legal proceedings are a condition precedent to any liability on the part of the guarantor, and that it makes no difference if the previous parties liable for the debt are, and have all the time been insolvent.[2] The guarantor of collection is in such case liable for the costs incurred in the endeavor to collect the debt from the previous parties.[3] It is generally held that a guarantor that a debt is collectible is only liable in case it is not collectible, because otherwise he is not in default.[4] But it is the doctrine of a majority of the courts, and seems the better opinion, that the fact that it is not collectible may be shown by any other competent evidence as well as the fruitless prosecution of a suit against the previous parties liable for the debt, and if such parties are actually insolvent, no suit

[1] See opinion of Kent, C. in Hayes v. Ward, 4 Johns. Ch. 123, and authorities there cited.

[2] Craig v. Parkis, 40 New York, 181, three judges dissenting; Mains v. Haight, 14 Barb. (N. Y.) 76; Cumpston v. McNair, 1 Wend. 457; French v. Marsh, 29 Wis. 649; Newell v. Fowler, 23 Barb. (N. Y.) 628; Cady v. Sheldon, 38 Barb. (N. Y.) 103; Burt v. Horner, 5 Barb. (N. Y.) 501; Sheppard v. Phears, 35 Texas, 763.

[3] Mosher v. Hotchkiss, 2 Keyes, (N. Y.) 589; *Id.* 3 Alb. Rep. omitted cas. 326.

[4] Foster v. Barney, 3 Vt. 60.

against them is necessary to charge the guarantor.[1] Where the payee of a note, by an indorsement on its back, guaranties its collection, and the note is secured by a collateral mortgage, which is referred to in it, and which is assigned at the same time as the note, he is not liable upon the guaranty until resort has been had to the mortgage as well as to the note, for the collection of the money secured.[2] So, where the defendants transferred to the plaintiffs two notes, with a lien on a canal-boat given to secure their payment, and also executed a guaranty of the notes, conditioned that the plaintiffs should use all proper and reasonable means to collect them of the maker before resorting to the defendants on the guaranty, it was held that the lien on the boat must be exhausted before the defendants could be sued on their guaranty.[3] In these two cases, according to the fair construction of the terms of the guaranties, the guarantors were not in default until the liens on the property of the principals were exhausted. They do not at all conflict with the cases which hold that where the surety or guarantor, by the terms of his contract, is in default, he may be sued at once without the creditor being obliged to foreclose a mortgage for the same debt on the property of the principal.

§ 84. **When guarantor secondarily liable—When creditor must use diligence against principal, and what will excuse its use.**—A guaranty on the back of a note was: "I hereby guaranty the payment of the within note." Held, the guarantor was not primarily liable, and in order to charge him it was necessary that the creditor should be diligent in endeavoring to collect the note from the principal, unless diligence would have been unavailing.[4] The same thing was held where the assignor of a non-negotiable note and a judgment guarantied the "payment" of the same:[5] Where the assignor of a bond covenanted to "stand

[1] White *v.* Case, 13 Wend. 543; Peck *v.* Frink, 10 Iowa, 193; Brackett *v.* Rich, 23 Minn. 485; Stone *v.* Rockefeller, 29 Ohio St. 625; M'Doal *v.* Yeomans, 8 Watts, (Pa.) 361; Thomas *v.* Dodge, 8 Mich. 51; Sanford *v.* Allen, 1 Cush. 473; Dana *v.* Conant, 30 Vt. 246; Cooke *v.* Nathan, 16 Barb. (N. Y.) 342; Jones *v.* Greenlaw, 6 Cold (Tenn.) 342; Cady *v.* Sheldon, 38 Barb. (N. Y.) 103.

[2] Barman *v.* Carhartt, 10 Mich. 338; Johnson *v.* Shepard, 35 Mich. 115; no proceedings need be had under the mortgage, however, if it is wholly valueless, Cady *v.* Sheldon, 38 Barb. (N. Y.) 103.[a]

[3] Brainard *v.* Reynolds, 36 Vt. 614.

[4] Farrow *v.* Respess, 11 Ired. Law (Nor. Car.) 170.

[5] Benton *v.* Gibson, 1 Hill, Law (So. Car.) 56.

security for the payment of it:"[1] Where the guaranty was "I do hereby assign and guaranty the payment of the within bond:"[2] Where two receipts of an officer for the collection of certain bills were assigned, as follows: "I trade the above to * for value received, and guaranty the payment of the same:"[3] And where under a note was written: "I do hereby guaranty the payment of the above note."[4] The payee of a note indorsed it as follows: "I hereby guarantee this note good until January 1st, 1850." Held, the effect of the guaranty was that the makers of the note should be in a condition that payment of the note could be enforced against them till January 1st, 1850, if legal diligence was used.[5] Due diligence on the part of the creditor against the prior parties liable for the debt, or an excuse that they were insolvent, have been held necessary to charge the guarantor, when the assignment of certain notes stated: "We hereby agree to hold ourselves ultimately responsible with the above parties:"[6] When the indorsement on a note was "to be liable only in the second instance:"[7] And when in the assignment of a bond the words were: "I * hold myself liable for the ultimate payment."[8] In the foregoing cases the fair import of the guarantor's contract was considered to be that he did not become liable to suit unless due diligence was used to collect the money from the prior parties, if they were solvent. If the prior parties were wholly insolvent, then the fair import of the contract was held to be that no such diligence was necessary. When, however, the contract expressly provides that the guarantor shall not be liable until after "due course of law" has been exhausted against the prior parties, there is no room for construction, and the exact diligence stipulated for, no matter how vain it may be, nor how insolvent the parties, must be used to charge the guarantor.[9]

[1] Rudy v. Wolf, 16 Serg. & Rawle (Pa.) 79.

[2] Johnston v. Chapman, 3 Pen. & Watts (Pa.) 18.

[3] Craig v. Phipps, 23 Miss. 240.

[4] Isett v. Hoge, 2 Watts (Pa.) 128.

[5] Hammond v. Chamberlin, 26 Vt. 406. As to what is a guaranty of collection necessitating diligence against the principal, see, Evans v. Bell, 45 Texas, 553.

[6] Johnston v. Mills, 25 Texas, 704.

[7] Pittman v. Chisolm, 43 Ga. 442.

[8] Lewis v. Hoblitzell, 6 Gill & Johns. (Md.) 259.

[9] Dwight v. Williams, 4 McLean, 581; Moakley v. Riggs, 19 Johns. 69; Eddy v. Stantons, 21 Wend. 255. The precise opposite of this has been held in Heralson v. Mason, 53 Mo. 211, upon the ground that the principal being insolvent, the law would dispense with

The reason is, that the parties have so agreed, and the court cannot make a contract for them, which it would do if it dispensed with anything required by the contract. On the same principle, where a surety for the payment of rent stipulated that he should be notified of the tenant's default, it was held that he must be so notified, or he would not be bound, even though he was not in any manner injured by want of the notice.[1] In cases where the guarantor is not liable unless diligence is used by the creditor against the previous parties, the guarantor may, by parol, waive the use of such diligence.[2] When a note is guarantied to be collectible, all prior solvent parties, such as an indorser,[3] and the estate of a deceased indorser,[4] must be exhausted before the guarantor is in default. When the effect of the undertaking is to guaranty the solvency of the prior parties, and no particular kind of diligence is stipulated for in the contract, the fact that such prior parties are actually insolvent, constitutes a breach of the guaranty. In such case, no suit need be brought against such prior parties; and such insolvency may be shown by any other competent evidence, as well as by fruitless legal proceedings against such prior parties.[5] If an execution, by virtue of which a levy upon all property of the prior parties might have been made, is returned by the proper officer *nulla bona*, this is *prima facie* evidence of the insolvency of such parties; but it is otherwise if the execution is issued by a justice of the peace, and real estate cannot, by virtue of it, be levied upon.[6] If the execution is thus returned within four days after it is issued, it is sufficient; for while a sale could not have been made in that time, property

a fruitless prosecution. This is nothing more nor less than to make a contract for the guarantor without his consent, and enforce it against him.

[1] Corporation of Chatham *v.* McCrea, 12 Up. Can. C. P. R. 352; Hillary *v.* Rose, 9 Phila. (Pa.) 139.

[2] Day *v.* Elmore, 4 Wis. 190; Ege *v.* Barnitz, 8 Pa. St. 304; Goodwin *v.* Buckman, 11 Iowa, 308; *contra*, Mosier *v.* Waful, 56 Barb. (N. Y.) 80.

[3] Loveland *v.* Shepard, 2 Hill (N. Y.) 139; Dana *v.* Conant, 30 Vt. 246.

[4] Benton *v.* Fletcher, 31 Vt. 418. If there are are several principals, all must be exhausted. Aldrich *v.* Chubb, 35 Mich. 350.

[5] Pittman *v.* Chisolm, 43 Ga. 442; Johnston *v.* Mills, 25 Texas, 704; Benton *v.* Gibson, 1 Hill, Law (So. Car.) 56; Cates *v.* Kittrell, 7 Heiskell (Tenn.) 606; Lewis *v.* Hoblitzell, 6 Gill. & Johns (Md.) 259; McClurg *v.* Fryer, 15 Pa. St. 293; Ashford *v.* Robinson, 8 Ired. Law (Nor. Car.) 114; Janes *v.* Scott, 59 Pa. St. 178; Farrow *v.* Respess, 11 Ired. Law (Nor. Car.) 170; Huntress *v.* Patten, 20 Me. 28; Bull *v.* Bliss, 30 Vt. 127; Wheeler *v.* Lewis, 11 Vt. 265.

[6] Gilbert *v.* Henck, 30 Pa. St. 205.

could have been found to levy upon if there had been any available for that purpose.[1] A promise by the guarantor to pay the debt, or giving his note for it, after the principal has failed to pay, is an admission that there has been no failure to use due diligence on the part of the creditor against the principal, and such diligence need not be otherwise proved in a suit against the guarantor.[2]

§ 85. **What is due diligence.**—When the terms of the guaranty and the circumstances of the parties are such that the creditor, in order to charge the guarantor, is bound to use due diligence against the parties previously liable for the debt, the question then arises: "What is due diligence?" "Due diligence generally, and in the absence of any special facts, would require suit to be instituted at the first regular term of the court after maturity, and the obtaining judgment and execution thereon, as soon as practicable by the ordinary rules and practice of the court."[3] By another court, due diligence has been said to be that which a vigilant creditor employs, when he has no other security than the obligation of the principal debtor. If the creditor employs legal process against the principal debtor without delay, the *prima facie* presumption is that he has been duly diligent, but suing out process simply, and letting it run its course, may not be due diligence. If the creditor has special knowledge of how he can collect the money, he must collect it, even if more than the regular process of suit is necessary.[4] What is due diligence in each particular case, will depend upon the circumstances of that case. A judgment against the prior parties liable for the debt, promptly obtained, and execution issued thereon, are *prima facie* evidence of due diligence. If, in such case, other facts exist, which show that due diligence has not been used, the burden of proving them is on the guarantor.[5] If the prior parties are without the state, but have property in the state, known to the creditor, which can be reached by attachment, the creditor must, in the exercise of due diligence, attach such property.[6] But if the creditor did not know, and by the use of reasonable diligence, could not have

[1] Day v. Elmore, 4 Wis. 190.

[2] Tinkum v. Duncan, 1 Grant's Cas. (Pa.) 228; Teller v. Bernheim, 3 Phila. (Pa.) 299.

[3] Voorhies v. Atlee, 29 Iowa, 49 per Cole, C. J.

[4] Hoffman v. Bechtel, 52 Pa. St. 190.

[5] Backus v. Shipherd, 11 Wend. 629. Aldrich v. Chubb, 35 Mich. 350. See, also, on this subject, Nichols v. Allen, 22 Minn. 283.

[6] White v. Case, 13 Wend. 543.

ascertained the facts which would have authorized an attachment, then he is not chargeable with negligence, if he does not cause an attachment to be issued.[1] If the prior parties are solvent, but live in another state, and have no property in the state where the creditor resides, it has been held that the creditor need not, in the exercise of due diligence, pursue such prior parties in such other state.[2] If the creditor causes an attachment to be levied on the property of the principal, but fails to collect the money because the attachment is defectively served, he does not use due diligence, and the guarantor is discharged.[3] A delay on the part of the creditor in bringing suit against the previous parties for upwards of six months;[4] for seven months;[5] and for seventeen months;[6] have been held to be unreasonable, and not the exercise of due diligence. Where a guaranty that certain notes then due were good, was made April 21st, 1841, and no demand was made on the parties primarily liable till July 29th, 1842, and no notice of default was given the guarantor till Feb. 29th, 1844, it was held that due diligence had not been used, and the guarantor was not bound.[7] A guaranty made April 10th, was as follows: "I warrant the within note good and collectible, until the 1st day of July." Suit was commenced by the holder, April 12th, and he could have obtained judgment in April, and the money could have been made, but in consequence of his negligence he did not get judgment until September, when the money could not be made. Held, the guarantor was not bound.[8] The institution of a suit against the principal six days after the maturity of a note, and prosecuting it diligently to judgment, has been held to be due diligence.[9] The same thing was held where judgment had been obtained against the principal, and an execution against his property had been returned *nulla bona* two days after the suit against the guarantor was commenced.[10] In the spring of 1860, a guaranty of a note due the first of the following September was made. From the time the note became due, till 1865, the State was engaged in war, and no debts could be collected,

[1] Forest *v.* Stewart, 14 Ohio St. 246.

[2] Towns *v.* Farrar, 2 Hawks (Nor. Car.) 163.

[3] Beach *v.* Bates, 12 Vt. 68.

[4] Craig *v.* Parkis, 40 New York, 181.

[5] Penniman *v.* Hudson, 14 Barb. (N. Y.) 579.

[6] Burt *v.* Horner, 5 Barb. (N.Y.) 501.

[7] Beeker *v.* Saunders, 6 Ired. Law, (Nor. Car.) 380. See, also, Mains *v.* Haight, 14 Barb. (N. Y.) 76.

[8] Wheeler *v.* Lewis, 11 Vt. 265.

[9] Foster *v.* Barney, 3 Vt. 60.

[10] Woods *v.* Sherman, 71 Pa. St. 100.

and upon the ending of the war the principal became insolvent. No suit was brought upon the guaranty till 1867. Held, due diligence had been used, and the guarantor was bound.[1] So, where suit was not brought against the principal for ten months, but he was all the time insolvent, it was held that the guarantor was chargeable, although the guaranty was such that suit within a reasonable time must have been commenced against the principal. The insolvency of the principal in such case has a bearing upon the question as to what is a reasonable time.[2] The question of due diligence, when the facts are not disputed, has been held to be one of law for the court.[3] It has also been held to be a question of fact for the jury.[4] And again, it has been held to be a mixed question of law and fact, which must be passed upon by the jury under the instructions of the court.[5] This latter seems the most reasonable view, and the one best supported by legal analogy.

§ 86. **When neither previous proceedings against principal nor his insolvency necessary to charge guarantor.**—When the terms of a guaranty of payment fix the time within which the payment shall be made, if the payment is not made within the time prescribed, there is a breach of the guaranty, and no steps need be taken against the principal, nor need his insolvency be shown, in order to charge the guarantor. This was held where the defendant gave an order for lumber, to be delivered to a third person which specified: "I will see you paid between this and the closing of the year:"[6] Where a bond due on a certain day was guarantied as follows: "For value received, we, the undersigned, guaranty the payment of the within bond, according to its terms:"[7] Where the guaranty was for the payment of a note "when due:"[8] And where the promisee, in a negotiable note, payable in six months, sold it, having made and signed the following indorsement: "I guarantee the payment of the within note in six months."[9] Where a state guarantied the "punctual

[1] Kinyon v. Brock, 72 North Car. 554.

[2] Bashford v. Shaw, 4 Ohio St. 264; Gallagher v. White, 31 Barb. (N. Y.) 92.

[3] Burt v. Horner, 5 Barb. (N.Y.) 501; Battle v. Blake, 1 Dev. Law, (Nor. Car.) 381.

[4] Rudy v. Wolf, 16 Serg. & Rawle, (Pa.) 79; Johnston v. Chapman, 3 Pen. & Watts. (Pa.) 18; Woods v. Sherman, 71 Pa. St. 100.

[5] Backus v. Shipherd, 11 Wend. 629.

[6] Cochran v. Dawson, 1 Miles (Pa.) 276.

[7] Roberts v. Riddle, 79 Pa. St. 468.

[8] Campbell v. Baker, 46 Pa. St. 243.

[9] Cobb v. Little, 2 Greenl. (Me.) 261.

payment of the interest" on certain bonds of a city, it was held that the state was liable immediately upon the default of the city, without any proceedings being had against it. The court said that while a guarantor was usually only liable after due diligence had been used to collect from the principal, yet the intention in each particular case must prevail, and in this case it was evidently the intention that the state should become liable immediately upon the default of the city.[1] A guaranty commenced as follows: "For a valuable consideration I hereby guaranty the prompt payment of * " (certain notes—describing them), and concluded: "And I hereby obligate myself as firmly for the prompt payment thereof, as if I had signed the same;" held, the guarantor was liable immediately upon default by the principals.[2] Where the payee of a negotiable note, after it was due, indorsed it as follows: "I guaranty the payment of this note, and costs, if any are made on it," it was held that the guarantor might be sued at once, and it was not necessary to proceed against the principal, or show his insolvency.[3] Where the indorsement of a note by the payee thereof was "I guaranty the payment of the within," it was held that no demand on the principal or notice of his default was necessary to charge the guarantor. The court said: "A guaranty of payment like the one in question is not conditional, but an absolute undertaking that the maker will pay the note when due."[4] It has also been held that the guaranty of "payment" of the debt of another, is broken as soon as the principal is in default without more, the distinction drawn being between a guaranty that the principal will pay and a guaranty that he is solvent. He may not pay and yet be solvent.[5] In all cases of guaranty of the payment of the debt of another, whether the guarantor is immediately liable upon the default of the principal without more, depends upon the terms of his contract as construed by the court.[6] Where a note is transferred by a

[1] Arents v. Commonwealth, 18 Gratt. (Va.) 750.

[2] Blackburne v. Boker, 1 Pa. Law Jour. Rep. 15; for a case holding, that if a party was liable at all he was only secondarily liable, see Richwine v. Scovill 54 Ind. 150.

[3] Burnham v. Gallentine, 11 Ind. 295.

[4] Brown v. Curtiss, 2 New York, 225, per Bronson, J.; see also, on this subject, Heaton v. Hulbert, 3 Scam. (Ill.) 489.

[5] Wren v. Pearce, 4 Smedes & Mar. (Miss.) 91; see, also, Bank of New York v. Livingston, 2 Johns, Cas. 409.

[6] In Pennsylvania it is held that a contract of guaranty creates only a con-

debtor to a creditor in payment of a debt, with a guaranty that it is good as gold and will be paid when due, and the note is in fact worthless for want of consideration, the guaranty is broken as soon as made, and may be sued upon immediately.[1] A guaranty of a lease was: "I hereby guaranty and become security for the faithful performance of * the party of the second part in the above indenture." Held, the guarantor was liable immediately upon the default of his principal.[2] The same thing was held where, upon the back of a paper providing for the delivery on demand of certain shares of stock, the following was written: "I hereby become security of * for the fulfillment of the within obligation."[3]

§ 87. **When a writing does not amount to a guaranty—Instances.**—A party wrote to others as follows: "I have the pleasure of recommending to you my friend * as a person in whom confidence can be placed. I am due him $400, but it is inconvenient for me to raise the money just now, should you give him time on the machine till * it will confer a favor on me and you may rest assured that the money will be forthcoming at the proper time." A machine was sold on the strength of this letter. Held, the writer was not liable for the price of the machine. There was no promise to pay and no fraud.[4] Plaintiffs had given credit to McC. for goods, but had not delivered them, whereupon the defendant wrote to the plaintiffs: "McC. wishes you to send down his stove, for he wants to put it up to-morrow morning. He is good for the amount he got from you." Held, the defendant was not liable for the goods sold. His letter contained no promise to pay, and was a mere declaration that one who had obtained

tingent liability, which becomes absolute by due and unsuccessful diligence to obtain satisfaction from the principal, or by circumstances that excuse diligence; Gilbert v. Henck, 30 Pa. St. 205. In Illinois a guarantor is held to be liable immediately upon default of his principal. Heaton v. Hulbert, 3 Scam. 489. Close attention should in every case be paid to the terms of the contract of the person who becomes responsible for the debt of another, by whatever name he may be called. Cases have sometimes been improperly decided, from the fact that a person to whom a certain designation, such as "guarantor" applied, has been held to the same liability as his class generally, the special terms of his agreement being overlooked.

[1] Koch v. Melhorn, 25 Pa. St. 89.

[2] Smeidel v. Lewellyn, 3 Phila. (Pa.) 70.

[3] Ashton v. Bayard, 71 Pa. St. 139; to similar effect, see Prentiss v. Garland, 64 Me. 155.

[4] Case v. Luse, 28 Iowa, 527.

credit was good.[1] The defendant delivered the following letter to the plaintiff: "Let * have what goods he may want on four months, and he will pay as usual." Held, this was not a guaranty, but at most an expression of confidence, that the party purchasing would pay for the goods bought, and there being no ambiguity about it, there was no occasion to resort to the surrounding circumstances, or the relations of the parties.[2] Certain soldiers purchased goods of a merchant which were charged to the persons purchasing them, and bills were made out to them. Across the face of each bill was written the word "accepted," and the name of the brigade quartermaster was signed thereto. Held, the quartermaster was not liable for the bills; the word "accepted" did not import a guaranty. If a guaranty had been intended, it would have been as easy to have written the word "guarantied," as the word "accepted."[3]

§ 88. **When a writing does amount to a guaranty—Instances.** —A party wrote on the back of a promissory note as follows: "I assign this note to * and indorse the prompt payment of it." Held, that the word "indorse" meant "guaranty" and that the party was bound as guarantor. The special indorsement was made either to restrict or enlarge the liability of the indorser. It was not used to restrict it. "The word [indorse] must be construed with reference to the words "prompt payment" in the same clause of the sentence, and when thus interpreted it is obvious that the word "indorse" was used in its broadest popular sense, which is sometimes synonymous with the word 'guaranty.'"[4] In articles for the purchase of land the purchaser covenanted to pay for the same in notes "such as he would be responsible for." Held, this agreement amounted to a guaranty of such notes as he transferred in payment for the land.[5] A letter written by a party to merchants with whom he had been in the habit of dealing, introducing to them his brother, who was a stranger, stating that the brother was going to their city to purchase goods, and requesting them to introduce him to some of the houses with which the writer dealt, "with assurance that any contract of his will and shall be promptly paid," is a guar-

[1] Kimball v. Roye, 9 Richardson Law (So. Car), 295.

[2] Eaton v. Mayo, 118 Mass. 141.

[3] Hatch v. Antrim, 51 Ill. 106.

[4] Tatum v. Bonner, 27 Miss. 760.

[5] Ward v. Ely, 1 Dev. Law (Nor. Car.) 372. As to what amounts to a guaranty, see, also, Westphal v. Moulton, 45 Iowa, 163.

anty, and binds the writer to payment for the goods sold. The court said: "As a guaranty is regarded as a mercantile instrument, it is not to be interpreted by any strict technical rules of construction, but by what may fairly be presumed to have been the intention and understanding of the parties."[1] H held a mortgage on G's land to secure a debt presently due, and C held a mortgage of the equity of redemption of the same land. C wrote to H, that he was "willing to agree to see him paid" $500, for G on account of G's mortgage to H, within sixteen months. Held, this was not a mere proposal for an arrangement, but, under the circumstances, a promise to pay. The court said the intention was plain, and "the courts never catch at words where the meaning is clear."[2]

§ 89. **Guaranty of payment "when due" of overdue note and of void certificate of deposit, valid.**—A note was made payable in three years from date, and after the expiration of that time a party covenanted that it should be paid "according to its tenor." It was contended that the contract was impossible of fulfillment, and not binding. But the court said: "The contract is to be construed with reference to the state of things then known to the parties as existing, and it being thus known to them that the day of payment of the note had already passed, the parties must be understood to be contracting with reference to a note overdue, and the guaranty was equivalent to a stipulation for the payment of a note payable on demand."[3] The same thing was held when, on the back of an overdue note, a guaranty was indorsed for the payment of the note "when due."[4] A guaranty of payment upon a negotiable note, over the signature of the indorser, is, in the absence of proof, presumed to have been written at the same time as the signature.[5] Principal and surety signed a note payable to a bank ten days after date. The principal, without the knowledge of the surety, left the note with the bank as collateral for what he then owed or might thereafter owe it. Suit was brought on the note by the bank against the surety, and the only claim of the bank was for money advanced the principal after the note was due. Held, the surety was not liable. He

[1] Moore v. Holt, 10 Gratt (Va.) 284, per Lee J.

[2] Colgin v. Henley, 6 Leigh (Va.) 85, per Cabell, J.

[3] Crocker v. Gilbert, 9 Cush. 131.

[4] Gunn v. Madigan, 28 Wis. 158.

[5] Gilman v. Lewis, 15 Me. 452.

was by the face of the note only liable for its amount at the end of ten days, and this was a very different thing from standing as a continuing guarantor.[1] The party to whom a certificate of deposit was issued, transferred it to another, who had no connection with and was ignorant of the circumstances attending its origin, with a guaranty of the payment thereof. The certificate was void for matters dehors its face. Held, the guarantor was liable for the amount of the certificate. The court said, the guaranty was in effect a representation that the instrument or claim was perfectly valid, as well as a promise to pay it.[2]

§ 90. **When surety for rent liable if tenant holds over—Burning of house, and landlord getting insurance, does not discharge surety for rent.**—A lessor by a lease commencing, "I agree to and with the said J to lease to him," demised to J certain premises, and by the same phrase, agreed in the same instrument, at the option of J, to lease him the premises for another year upon the same terms and conditions. The defendant, by a covenant next following in the same instrument, the stipulation for another year, agreed "that in case the said J shall neglect or refuse to pay the aforesaid rent in the manner aforesaid, I will pay the same within ten days thereafter;" held that the defendant was liable for the second year's rent as well as the first.[3] The same thing was held where a lease was for one year, but contained this provision: "This contract is to be renewed for three consecutive years, if it is fulfilled to the satisfaction of both parties," and the defendant, whose name was not mentioned in the lease, wrote at the bottom of it, "security for Frederick S. Gaylord," the lessee.[4] The plaintiff, by a lease which contained no stipulation for a renewal, demised to J a house for one year, at a certain rent, payable quarterly, and it was provided that J, before the expiration of the term, should give one quarter's notice of his intention to quit. The defendant, by a separate instrument, guarantied the

[1] Bank of St. Albans *v.* Smith, 30 Vt. 148.

[2] Purdy *v.* Peters, 35 Barb. (N.Y.) 239. For a case holding that if a guaranty is made *ultra vires*, and the paper guarantied afterwards, comes to the guarantor's possession, and is issued by it with the guaranty uncanceled, the guaranty is binding, see Arnot *v.* Erie R.R. Co., 67 New York, 315.

[3] Deblois *v.* Earle, 7 Rhode Is. 26.

[4] Decker *v.* Gaylord, 8 Hun. (N. Y.) 110; to same effect, see Dufau *v.* Wright, 25 Wend. 636. Holding guarantor of rent, reserved by defective lease, liable for rent reserved if lessee occupies the premises, see Clark *v.* Gordon, 121 Mass. 330.

faithful performance of the covenants" of the lease; "also the punctual payment" of the rent. J did not give the notice, and held over. Held, the guarantor was not liable for any rent after the expiration of the first year.[1] A rented a house and lot to B, and C became surety on the lease. The house was destroyed by fire, and A had insurance on it to its full value, which he got, and refused to rebuild. Held, that neither B nor C were discharged from the payment of rent by these facts. Having agreed to pay the rent, they were obliged to do so, even though the house was destroyed, and A was under no obligation to insure for their benefit.[2]

§ 91. **When surety concluded by result of litigation between other parties.**—If the effect of the obligation of the surety is that he shall be bound by the result of litigation between other parties, he is, in the absence of fraud and collusion, concluded by such result. Thus, a party gave bond with sureties in a chancery suit, to abide the decree of the Superior Court. A decree was finally entered in said court, which the principal endeavored to have set aside, alleging fraud in obtaining the same. Under the circumstances of the case, it was held that the principal could have no relief, and that the sureties stood in no better position. The court said they had undertaken to abide the event of the suit, and must do so. The sureties stood in no better position than the principal, subject to the single exception that, if a judgment or decree had been procured by collusion between the principal and the creditor, the sureties would not be bound thereby.[3] A party arrested for a debt fraudulently contracted, gave bond with surety, which provided "that if the fraud complained of shall be established, the said * security shall be liable for the debt of the complaining creditor." The fraud was established by verdict and judgment, by which the amount of the debt was also established. Held, the surety was concluded by the judgment, even as to the amount of the debt.[4] A lease provided that the time when the rent commenced should be determined by arbitrators, which was

[1] Gadsen *v.* Quackenbush, 9 Rich. Law (So. Car.) 222. See, also, on this subject, Brewer *v.* Knapp, 1 Pick. 332.

[2] Kingsbury *v.* Westfall, 61 New York, 356. Holding guarantor for rent, on tenancy from year to year discharged, if the landlord gives notice terminating the tenancy, even though the tenancy is afterwards continued. See Tayleur *v.* Wildin, Law Rep. 3 Exch. 303.

[3] Riddle *v.* Baker, 13 Cal. 295.

[4] Keane *v.* Fisher, 10 La. An. 261.

done, and a certain amount was thus ascertained to be due. There was a surety on the lease who became responsible for the rent for one year, according to the terms of the lease. The surety being sued for the amount found due by the award, it was held that in the absence of collusion or fraud, the surety was concluded by the award and could not show there was in fact no rent due.[1] A surety signed a bond with the claimant of some property. Another party gave the surety a bond, conditioned to save him harmless from loss or damage on account of the bond he had executed. In a suit on the last bond against the maker thereof, the plaintiff offered in evidence a writ and judgment, by which he had been adjudged to pay $100 on account of signing the first bond. Held, this was sufficient to authorize a recovery, and he was not obliged to show the evidence by which the judgment had been obtained.[2]

§ 92. **When surety for debt liable for additional damages.**—When such is the effect of his obligation, the surety for a debt is also bound for stipulated damages. Thus, a note provided for the payment of twenty per cent. per annum on its amount, as liquidated and agreed damages, if it was not paid at maturity. The following guaranty was written on the back of the note: "For value received, we guaranty the payment of the within note when due:" Held, the guarantors were liable for the damages, for they were as much a part of the note as any other.[3] So, sureties on a promissory note, which stipulates "that a reasonable sum, to be fixed by the court, for attorney's fees, shall be allowed and taxed as costs against the parties making the notes," are liable for such attorney's fees.[4] A statute provided that interest at the rate of ten per cent. might be contracted for; but if usury was contracted for, the creditor should only recover the principal sum, and judgment for ten per cent. against the debtor, and in favor of the State, should be entered for the benefit of the school fund. Suit was brought against a principal and surety on a note, and the surety set up and established usury: Held, judgment should be entered against both principal and surety, and in favor of the State, for the ten per cent. The statute did not except sureties, and the court would not.[5] A surety who guaranties the punctual

[1] Binsse v. Wood, 37 New York, 526.

[2] Spratlin v. Hudspeth, Dudley, (Ga.) 155.

[3] Gridley v. Capen, 72 Ill. 11.

[4] First National Bank of Fort Dodge v. Breese, 39 Iowa, 640.

[5] McIntosh v. Likens, 25 Iowa, 555.

payment of "the interest" on a money bond in which there is no stipulation for interest, is liable for interest accruing after the bond becomes due. As there was no interest on the bond when the guaranty was made, the guarantor must have intended to become liable for the interest to accrue after the bond was due.[1]

§ 93. **Whether surety liable beyond penalty of his bond.**— The surety on a bond cannot generally be held liable for any sum greater than the penalty thereof.[2] A surety in a stipulation given on the release from attachment of the property of a respondent in a suit in admiralty, cannot, where the stipulation is in a sum certain, be compelled to pay more than that sum, although the stipulation is conditioned to pay such sum as shall be awarded to the libellant by the final decree in the suit.[3] Where the surety on a sheriff's official bond has paid under judgments rendered on it the amount of the penalty, he can be held responsible for no more. "The principle which limits the liability of the surety by the penalty of his bond, inheres intrinsically in the character of his engagement. He does not undertake to perform the acts or duties stipulated by his principal, and would not be permitted to control their performance, and could not where his principal was a public officer."[4] When, however, the surety is bound to the same extent as the principal, and is himself in default, a sum in excess of the penalty of the bond, but not exceeding the legal rate of interest on the amount for the payment of which he is in default, may be recovered against him as damages for the detention.[5] "It may be a reasonable doctrine that a surety, who has bound himself under a fixed penalty for the payment of money, or some other act to be done by a third person, has marked the utmost limit of his own liability. But when the time has come for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable, and altogether just, that he should compensate the creditor for the delay which he

[1] Hamilton v. Van Rensselaer, 43 Barb. (N. Y.) 117.

[2] Clark v. Bush, 3 Cowen, 151; Fairlie v. Lawson, 5 Cowen, 424; Oshiel v. DeGraw, 6 Cowen, 63.

[3] Brown v. Burrows, 2; Blatchford, 340.

[4] Leggett v. Humphreys, 21 How. (U. S.) 66, per Daniel, J.

[5] Lewis v. Dwight, 10 Conn. 95; State v. Wayman, 2 Gill. & Johns. (Md.) 254; Harris v. Clap, 1 Mass. 308; Judge of Probate v. Heydock, 8 New Hamp. 491; Mayor and City Council of Natchitoches v. Redmond, 28 La. An. 274.

has interposed. * The question, in short, is not what is the measure of a surety's liability under a penal bond, but what does the law exact of him for an unjust delay in payment, after his liability is ascertained and the debt is actually due from him."[1] It has been held that an official bond does not bear interest from the breach, or the demand, or the commencement of the suit for the penalty, and that the sureties cannot be held for more than the amount of the penalty.[2]

§ 94. **When surety on note liable if it is not discounted by party to whom it is payable.**—When a surety becomes a party to a negotiable promissory note, payable to a particular person, with the design of raising money to be used by the principal for a certain purpose, and the note is not discounted by the payee, but is discounted by another, and the money is applied to the purpose intended, it is generally held that the surety is liable for the note.[3] To the objection that the surety has a right to choose his creditor, it is answered that if the payee had discounted the note, he might the next moment have transferred it to another, and so the surety cannot in such case choose his creditor, and as the object which the surety had in view has been accomplished, he is in nowise prejudiced, and is bound. A being principal, and B surety, executed a note payable to a bank, for the purpose of enabling A to raise money on it for his benefit. The bank refused to discount the note for A, and C being told by A that the bank would discount the note, himself advanced the money on it to A, and took it to the bank, which again refused to discount it. C then got the bank to discount the note for him, and afterwards B gave the bank notice not to discount it. Held, the bank must be considered as having adopted the payment of the note made by C, and could sue on the note for C's use.[4] In another case, J being indebted to P, gave him a note signed by himself and sureties, payable to a bank, with the agreement between J and P that P should get it discounted, and apply the proceeds, and if it could not be

[1] Brainard *v.* Jones, 18 New York, 35, per Comstock, J.

[2] State *v.* Blakemore, 7 Heiskell, (Tenn.) 638.

[3] Keith *v.* Goodwin, 31 Vt. 268; Starrett *v.* Barber, 20 Me. 457; Bank of Middlebury *v.* Bingham, 33 Vt. 621; Planters' and Merchants' Bank *v.* Blair, 4 Ala. 613; Bank of Newbury *v.* Richards, 35 Vt. 281; Browning *v.* Fountain, 1 Duvall, (Ky.) 13; Ward *v.* Northern Bank of Kentucky, 14 B. Mon. (Ky.) 283; Thrall *v.* Benedict, 13 Vt. 248.

[4] Bank of Burlington *v.* Beach, 1 Aiken (Vt.) 62.

discounted, it should be returned; but this agreement was not known to the sureties. P could not get the note discounted, but left it with the bank as collateral security for a debt he owed it, and so informed J, who made no objection; after the note came due, it was by agreement between J and P, and without the sureties' knowledge, applied on J's indebtedness to P, and P thereafter prosecuted a suit which the bank had commenced for his benefit. Held, that as the note had accomplished the purpose intended, the sureties were bound.[1] A as principal and B as surety, signed a note payable in six months to C, for the purpose of enabling A to get cloth to the amount of the note from C. A got cloth from C amounting to more than half the note, and C not having enough of the cloth, D furnished the rest on an understanding between A, C and D, that a *pro rata* share of the note should inure to the benefit of D. Afterwards C transferred the entire note to D, and he sued on it. Held, B was liable.[2] Principal and surety executed a note with the expectation that with it the principal would buy a yoke of oxen of A, and give the surety a mortgage on them for his indemnity. The principal did not buy the oxen of A, but bought a yoke of oxen of B, he knowing that the note had been given to buy the oxen of A, but not knowing of the agreement about the mortgage. The oxen purchased from B did not come to the face of the note, and $6.25 was credited on the back of the note when it was delivered to B. Held, both the principal and surety were liable on the note. It was used for the purpose intended, and the credit on its back was not an alteration of it any more than a credit at any other time would have been.[3] A bought a horse of B, and in payment for it gave his note, with two sureties, payable to a bank, or order. It was intended to raise money on the note to pay for the horse, but there was no evidence that the sureties knew the purpose for which the note was given. The bank refused to discount the note, and before it became due, the sureties notified the bank not to discount it. After the note became due, the bank indorsed it to B, who had always held it, and he sued upon it. Held, the sureties were liable. The Court said "It (the

[1] Bank of Montpelier *v.* Joyner, 33 (Vt.) 481; to same effect, see Smith *v.* Moberly, 10 B. Mon. (Ky.) 266; to similar effect, see Perry *v.* Armstrong, 39 New Hamp. 583.

[2] Lyman *v.* Sherwood, 20 Vt. 42.

[3] Laub *v.* Rudd, 37 Iowa, 617.

note) has not followed, perhaps, the precise channel that was anticipated, but it has not been turned from a strictly legal channel."[1] Principal and surety executed a note to a married woman for some land, and she alone made a deed for it, which was void. Afterwards she died, leaving her property, by will, to her husband. The principal became insolvent, and after the note became due, discovering that his title was bad, applied to the husband, who made him a deed for the land. Held, the surety was liable on the note. The principal could not repudiate it, having received the consideration, and as the surety had executed the note for the purpose of purchasing the land, and it had been used for that purpose, he was bound.[2] The condition of a bond that the principal shall pay "all notes, acceptances, and other obligations whatever," given by him for his indebtedness, is applicable not alone to his several notes, but also to notes, if given for his contemplated indebtedness, in which other parties are joint promisors with him.[3] A made a note payable to B, and C executed the note with A as joint maker, the object being to raise money for A's use. B did not discount the note, nor indorse it, but D did advance money on it to A, and sued A and C on it in the name of B. The court held C liable, and said the law was that if C signed the note with the understanding that it was to be passed to B, and no one else, then he was not liable. But if C signed as surety, with the general purpose of enabling A to raise money on the note, without limiting him as to the person to whom he was to pass it, he would be liable to any one to whom it was passed.[4]

§ 95. **When surety on note not liable, if it is discounted by party other than payee.**—When a surety signs a negotiable note with the principal for a particular purpose, and it is diverted from that purpose by the principal, and the party taking it has then knowledge of facts sufficient to charge him with notice of such diversion, the surety is not bound.[5] But if the party tak-

[1] Cross v. Rowe, 22 New Hamp. 77, per Eastman, J.

[2] Campbell v. Moulton, 30 Vt. 667.

[3] Parham Sew. Mach. Co. v. Brock, 113 Mass. 194.

[4] Perkins v. Ament, 2 Head, (Tenn.) 110. The fact that a person was induced to sign his name as surety to a negotiable note without reading it, under representations of the maker that it was payable to a bank, when it was in fact payable to an individual, constitutes no defense to the note in an action thereon by the payee, when it does not appear that he had any knowledge of the alleged fraud. Wright v. Flinn, 33 Iowa, 159.

[5] Brown v. Taber, 5 Wend. 566.

ing the note have no such notice, express or implied, and take the note in good faith and for value, the surety will be bound to him notwithstanding such diversion.[1] A party became surety on a note for $100, payable to a bank, for the purpose of purchasing lumber for the principal with $75 of the money, and paying $25 of it to the surety and his partner for a debt due them from the principal. The bank never discounted the note, but another creditor of the principal, to whom he owed $22, took out that sum and gave the principal the balance in money. Suit was brought against the surety in the name of the bank, for the use of the party discounting the note, and it was held he was not liable. "From the fact that the defendant was willing to become surety to a particular party to raise money for particular objects, it would be unreasonable to infer that he consented to assume a general liability to any party and for any purpose." The note had been diverted from the purpose intended, and the party who took it had notice thereof, from the fact that on its face it was payable to the bank.[2] So, where principal and surety, for the purpose of raising money for the principal's family, signed a note payable to the order of a bank, which the bank refused to discount, and the principal gave it to a creditor of his to pay a preexisting debt, it was held the surety was not liable. The fact that the note was payable to the bank was sufficient notice to the creditor that the note was made for the purpose of raising money, and if he had inquired, he would have found that his taking the note would defeat the very purpose for which the surety signed.[3] Principal and sureties signed a note payable to a bank, with the understanding that it should be discounted at the bank. The note never was discounted by the bank, but was sold by the principal to one Cook, who sued it in the name of the bank. Held, the sureties were not liable. The court said the sureties might have been willing to be bound to the bank, but to no one else. "The reasons for such a preference may be perfectly satisfactory and prudential. Then, as the sureties * agreed to be bound to the bank only, and signed the note with the understanding that it was to be delivered to and discounted by the bank, and that they were not to be bound unless it should be so delivered and discounted, the sale and delivery of the note to Cook, without

[1] McWilliams v. Mason 31 New York, 294.

[2] Manufacturers' Bank v. Cole, 39 Me. 188.

[3] Russell v. Ballard, 16 B. Mon. (Ky.) 201.

their knowledge or assent, had no binding operation as to them."[1] The same thing was held where the note was payable to a bank or order, and it was discounted by a third person, the fact that the note was payable to the bank being held sufficient notice to such third person.[2] It has been held that an accommodation drawer of a bill of exchange, made payable to a particular bank for the purpose of being discounted by the bank named, cannot be held liable on the bill to a third person who, after discount by the bank had been refused, took the bill from the principal for value, and also that such drawer cannot be held liable to the bank where it subsequently discounts the bill for such third person, with notice of the suretyship of the drawer.[3] In holding that a note by principal and surety, made payable to a bank, but discounted by a third person, did not bind the surety, the court said: "He might be willing to lend his name to procure a loan from a party who would indulge him—who would advance to his principal the full face of the note—when he would be utterly unwilling to go security to one who was his personal enemy, or who would exact harsh terms or heavy interest of his principal."[4] Again, it has been held, that if a note payable to a particular person, is signed by a surety and sold to another person, the surety is not liable thereon, without his express or implied consent, but such consent may be inferred from the course of business between the parties. This was held, "not upon the ground that there has been a change of contract prejudicial to him, but that there has been no completed contract at all; that there was no delivery to the only party to whom the note, by its very terms, was to be delivered, and therefore that the contract which was merely undertaken to be made, never took effect."[5] From the cases referred to, it appears there is some conflict of authority on this subject. Unless the party suing on the note is the *bona fide*

[1] Conway *v.* Bank of U. S. 6 J. J. Marsh, (Ky.) 128, per Robertson, C. J. The precise opposite of this was held, in Farmers and Mechanics' Bank *v.* Humphrey, 36 Vt. 554; Briggs *v.* Boyd, 37 Vt. 534. It seems that in these two last cases the surety was held liable on a contract he never consented to make, and which the taker of the note should have known he never consented to make.

[2] Prescott *v.* Brinsley, 6 Cush. 233; to same effect, see Allen *v.* Ayers, 3 Pick. 298.

[3] Knox Co. Bank *v.* Loyd's Admr. 18 Ohio St. 353.

[4] Clinton Bank *v.* Ayres, 16 Ohio, 283, per Birchard, C. J.

[5] Chase *v.* Hathorn, 61 Me. 505, per Peters, J.

holder thereof for value, without notice, and has the right to sue thereon in his own name, there seems to be much force in the objection that the surety has a right to choose his creditor. A reason not already suggested, is, that while the payee, if he had discounted the note, would have had the power to sell it to another, yet he might not have done so. In every instance, much will depend upon the form of the paper and the special circumstances of the case.

§ 96. **When guarantor on general guaranty, or on guaranty addressed to another, liable to person acting on it.**—Where a letter of credit is general, addressed to all persons, any one to whom it is presented may act upon and enforce it.[1] A letter of credit addressed to one with the design that it be shown to others to induce them to act upon it, may be sued on by such others in their own names, if acted upon by them.[2] An action may be maintained by the several partners of a firm, upon a guaranty given to one of them, if there be evidence that it was given for the benefit of all.[3] D, who was a merchant in the country, dealing in all sorts of merchandise, being about to purchase a stock of goods in New York, received from A, who had been his partner, a guaranty addressed to no person named, by which A agreed to be responsible for what goods D might purchase in New York: Held, A was liable to every person from whom D purchased goods in pursuance of the guaranty; that the guaranty was not limited to the first person who sold goods on its credit; and that A was liable for goods sold on the credit usual in such cases.[4] Defendant signed a letter of credit addressed to F, as follows: "As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guaranty the payment of any bills which you may make under this letter of credit in Baltimore, not exceeding fifteen hundred dollars:" Held, that any person advancing goods to F, upon the faith of the guaranty, could maintain an action thereon against the defendant as guarantor.[5] A letter of credit was as follows: "James McElroy, Dear Sir:

[1] Birckhead *v.* Brown, 5 Hill (N. Y.) 634; affirmed on error, 2 Denio. 375. See, on this subject, Wheeler *v.* Mayfield, 31 Texas, 395; Mayfield *v.* Wheeler, 37 Texas, 256.

[2] Lonsdale *v.* Lafayette Bank, 18 Ohio, 126.

[3] Garrett *v.* Handley, 4 Barn & Cress. 664.

[4] Lowry *v.* Adams, 22 Vt. 160.

[5] Griffin *v.* Rembert, 2 Richardson, N. S. (So. Car.) 410. To the same effect, see Manning *v.* Mills, 12 Up. Can. Q. B. R. 515.

Mr. John Tichenor is going to the city to purchase goods. * I will guaranty the payment of such debts as he may contract for the purchase of goods on credit." McElroy was at that time a clerk in a store, but had no store of his own. Tichenor bought goods from four different houses on the strength of the guaranty, the whole amounting to a less sum than that mentioned in the guaranty. Held, the guarantor was liable for all the bills. The court said it was apparent from the face of the guaranty that McElroy was not expected to furnish the goods. "It is a general letter of credit addressed through McElroy, a common friend, to the merchants in the city."[1] Defendant addressed to J. V. & Co. the following guaranty: "In consideration of your filling the orders for goods from your Birmingham house of J. C. & Co., say the spring importations, I hereby hold myself responsible for and guaranty the payment of the same to you." J. V. & Co. were the agents in New York for the Birmingham house referred to. The goods having been furnished to J. C. & Co., it was held that the Birmingham house could sue on the guaranty, if intended for their benefit, and whether so intended might be proved by parol.[2] A guaranty was as follows: "Captain Charles Drummond: Dear Sir: My son William, having mentioned to me that in consequence of your esteem and friendship for him, you had caused and placed property of your and your brother's in his hands for sale, and that it is probable from time to time you may have considerable transactions together; on my part I think proper to guaranty to you the conduct of my son, and shall hold myself liable, and do hold myself liable, for the faithful discharge of all his engagements to you, both now and in future. George Prestman." Held, this guaranty extended to and covered a debt incurred by William Prestman to Charles Durand, and his brother, Richard Durand, as partners, it being proved that the transactions to which the letter related were with them as partners, and that no other brother of Charles Durand was interested therein. The court said, that according to the ordinary construction of the words of the guaranty, they were intended to apply to a partnership liability.[3] In all these cases the guaranty, although addressed to no one, or to the purchaser, or to a third person, or to

[1] Benedict v. Sherill, Lalor's Sup. to Hill & Denio, 219.

[2] Van Wart v. Carpenter, 21 Up. Can. Q. B. R. 320.

[3] Drummond v. Prestman, 12 Wheaton, 515.

one of several, was held to be intended for the party advancing upon it, and the guarantor was for that reason held liable.

§ 97. **When guarantor not liable to any one except party to whom guaranty is addressed.**—Usually a guaranty when addressed to a particular party, can only be acted upon and enforced by such party.[1] A guaranty was on its face addressed to "Col. Smith & Pilgrim," but on its back it was addressed to Smith only. The day previous to the date of the letter the partnership of Smith & Pilgrim was dissolved, and Smith alone sold the goods. Held, the guarantor was not liable. The face of the guaranty only could be considered, and not the address on the back. As there was no ambiguity about the guaranty, parol evidence could not be received to vary it.[2] A letter of credit was addressed to A. After the date of the letter, A entered into partnership with B, and A & B furnished the goods. Held, the writer of the letter was not liable for the goods so furnished. A's manner of doing business may have been different from that of the firm, or the writer of the letter may have expected favors from A, which the firm would not grant him.[3] In another case, in which the same thing was decided, the court said: "It is a case of pure guaranty, a contract which is said to be *strictissimi juris*, and one in which the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it. * He has a right to prescribe the exact terms upon which he will enter into the obligation, and to insist on his discharge in case those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, this is not my contract, *non in haec foedere veni.*"[4] A of New York gave a letter of credit to B, addressed to C, in Albany, requesting him to deliver goods to B on the best terms, to a certain amount. C, instead of delivering the goods himself, gave B a letter to D, in

[1] Taylor v. Wetmore, 10 Ohio, 490; Bleeker v. Hyde, 3 McLean, 279.

[2] Smith v. Montgomery, 3 Texas, 199.

[3] Sollee v. Meugy, 1 Bailey Law (So. Car.) 620.

[4] Barns v. Barrow, 61 New York, 39, per Dwight, C.; to same effect, see Stevenson v. McLean, 11 Up. Can. C. P. R. 208; Allison v. Rutledge, 5 Yerg. (Tenn.) 193; Bussier v. Chew, 5 Phil. (Pa.) 70. A letter of credit addressed to P. & Co. will not authorize advances by P alone, after the firm is dissolved, Penoyer v. Watson, 16 Johns. 100.

Geneva, requesting him to deliver goods to B to the same amount, and engaging to be responsible. D delivered the goods to B. In an action by C against A, for the amount, it was held he was not liable. A had the right to stand on the terms of his contract, and, moreover, D may not have given B as good terms, or sold the goods as cheap as C would have done.[1] Two firms, composed of the same members, were doing business in the same city, but in different parts thereof, the name of one firm being Taylor, Gillespie & Co., and that of the other David B. Taylor & Co. A party knowing these facts, gave a letter of credit addressed to "Messrs. Taylor & Gillespie," and the firm of David B. Taylor & Co. gave credit on it. Held, the guarantor was not liable. The guaranty was intended for Taylor, Gillespie & Co., and the other firm could not recover on it. A partnership consists of something besides its individual members. It has its stock in trade, place of business, books, bills, papers, accounts, etc.[2] A letter of credit purported to bind the guarantors to "any person in Macon, Georgia, who may feel disposed" to advance goods. Without the writer's consent, this was changed by inserting Griffin in place of Macon, and the goods were bought in Griffin. Held, the guarantors were not bound.[3] A mortgage was given to secure the debt of a third party to the extent of $800, so long as the creditor should continue to sell goods to such third party. Subsequently, the creditor transferred his business to other persons, with whom the debtor continued to deal for some time. During the course of such dealing, the debtor paid in more than sufficient to cover the amount of the mortgage. Held, the payments must be applied to the oldest items of account, and that the mortgage was discharged.[4] A guaranty commenced: "C. C. Trowbridge, Esq., President, Detroit, Mich.," and there was no further designation of the party addressed; money was advanced on the guaranty by the Michigan State Bank, of which Trowbridge was president. Held, it might be shown by parol that the guaranty was intended for the bank. The court said that a guaranty follows the general rule of law with reference to simple contracts, "which is that they may be sued either in the name of the nominal or of the real party, * and in the

[1] Walsh v. Bailie, 10 Johns. 180.

[2] Taylor v. McClung's Exr. 2 Houston, (Del.) 24.

[3] Johnson v. Brown, 51 Ga., 498.

[4] Royal Canadian Bank v. Payne, 19 Grant's Ch. R. (Canada) 180.

present case, the letter of credit being addressed to the person as president, and the showing him president of the plaintiffs' bank, and of no other institution, renders it certain that it was intended for the plaintiffs' benefit."[1]

§ 98. **Surety for several not liable for one—Surety for one not liable for several.**—The sureties on a bond conditioned that the principal shall pay for all purchases made by him from the obligee, are not liable for purchases made from the obligee by a partnership of which the principal has subsequently become a member.[2] A wrote to B as follows: "Anything you can do for the bearer, Major S. M. Neill, whom I introduce as my friend, will be done for me, he being a merchant in Clinton. P. S. If you should accept for Mr. Neill for one thousand dollars, I will be bound by this note." On the strength of this, B guarantied two drafts of Hardesty & Neill. Held, A was not liable for such guaranty. A "might have been willing to become the security of Neill, and not of Hardesty and Neill. The engagement was personal as to Neill."[3] The defendant executed a bond as surety to an insurance company for the fidelity of A, who was appointed an agent of the company at Adelaide, and who was about to, and afterwards did, enter into partnership (as merchants) with B, also an agent of the company at that place. The condition of the bond was, that A should well and truly account for all money received by him. Held, the defendant was not, under this bond, responsible for money received by the firm A & B, notwithstanding he was aware at the time he signed the bond that A was about to become B's partner.[4] A bond given by the defendant to the plaintiff, recited that A had been appointed agent for the plaintiff, and was conditioned for A's good behavior. At the time the bond was given the defendant knew that A was to be employed only as a partner with B. Afterwards A & B received money, as partners, for which they did not account. Held, the defend-

[1] Michigan State Bank v. Pecks, 28 Vt. 200, per Redfield, C. J. For other cases where parol evidence was held admissible, see Wadsworth v. Allen, 8 Gratt. (Va.) 174; Garrett v. Handley, 4 Barn. & Cres. 664; Van Wart v. Carpenter, 21 Up. Can. Q. B. R. 320; Drummond v. Prestman, 12 Wheaton, 515. If there is no ambiguity, parol evidence is not admissible. Smith v. Montgomery, 3 Texas, 199.

[2] Parham Sew. Mach. Co. v. Brock, 113 Mass. 194; to same effect, see Shaw v. Vandusen, 5 Up. Can. Q. B. R. 353.

[3] Bell v. Norwood, 7 Louisiana (1 Curry) 95, per Bullard, J.

[4] Montefiore v. Lloyd, 15 J. Scott (N. S.) 203.

ant was not liable for the money so received by A & B. "When a party makes himself surety for the conduct, not of A & B, but of A, the stronger proof you give that he knew the relation in which A and B stood to each other, the stronger you make the inference arising from his mentioning only A."[1] A guaranty for goods to be sold to a firm will not cover advances made to one member of the partnership after its dissolution.[2] If a guaranty is given to a partnership, and one of the members dies,[3] or there is a change in the membership of the firm in any other way,[4] the guaranty will not cover any advances which are afterwards made. A, B and C were partners, as bankers, and their partnership articles provided that, if any one of them died, the legal representatives of such one might take his place in the business. D agreed to become responsible "for all sums of money, not exceeding £20,000, which were then, or should afterwards become due (from E) to A, B and C, and the survivors, or survivor, of them, or the executors or administrators of such survivor." A died, and his legal representative became a member of the firm. Held, D was not liable for any advances made to E after the death of A.[5] A bond recited that A and B were bankers, at Sunderland, and was conditioned that they would remit to plaintiff all such sums as they, "or either of them," should draw on plaintiff. A died, and B afterwards drew bills. Held, the surety on the bond was not liable for such bills. From the whole instrument, the intention appeared to be to become responsible for bills which the two partners, or one of them, during the existence of the partnership, should draw.[6] But where a party agreed to guaranty such notes as should be indorsed by a firm, and the firm was dissolved, and one of the partners was, by power of attorney, authorized by the others to transact any remaining partnership business, it was held, the guarantor was liable for indorsements made by such partner in the firm name in closing up the partnership business.[7]

[1] London Assurance Co. v. Bold, 6 Adol. & Ell. (N. S.) 514, per Lord Denman, C. J.

[2] Cremer v. Higginson, 1 Mason, 323.

[3] Holland v. Teed, 7 Hare, 50.

[4] Spiers v. Houston, 4 Bligh (N. R.) 515; Dry v. Davy, 2 Perry & Dav. 249.

[5] Pemberton v. Oakes, 4 Russell, 154.

[6] Simson v. Cooke, 8 Moore, 588. To similar effect, see Hawkins v. New Orleans Print. & Pub. Co. 29 La. An. 134.

[7] New Haven Co. Bank v. Mitchell, 15 Ct. 206.

A party agreed to guaranty the payment for such goods as should be sold to two partners. A bill of goods was so sold, and immediately afterwards the seller arranged with one of the partners that the other should go out of the firm, and took the note of the remaining partner alone for the goods, the note being payable to a third person. Held, these transactions discharged the guarantor, as the whole course of dealing was changed.[1] The guarantor for goods to be sold to a partnership, is not liable for goods sold to the partnership after a change in the members composing it.[2] Sureties became bound for the performance of a particular act (the sale of property) by two persons, one of whom died, and the other sold the property and failed to account for it. Held, the sureties were not liable for such failure. They became sureties for both parties, and might not have been willing to become bound for the acts of one alone.[3] A gave B a guaranty for goods to be purchased by C, to the extent of 200*l.*, the guaranty not being a continuing one. C took in D as a partner, and B sold C and D goods on the credit of the guaranty to the extent of more than 200*l*, and C and D failed. Afterwards, B sold C alone goods on the credit of the guaranty. Held, B could not recover on the guaranty for the goods sold C and D, because they were not within its terms. Nor could he recover for the goods sold to C alone, because then, by his own act, the circumstances of C were changed, and he was jointly with D saddled with a debt of more than 200*l.*[4] A surety for gas, to be supplied to a person on certain premises, is not liable for gas supplied to another person on the same premises, even if the person for whom he became responsible did not notify the gas company of the change in the proprietorship of the premises.[5] The defendant guarantied that certain parties would receive and pay a certain price for a steam engine and two boilers of a given capacity, particularly described. By agreement of the principals, without the consent of the defendant, an engine with three boilers, and of greater capacity and power, at an additional price, was substituted, and it was held that the defendant was not liable therefor. The court said that the defendants may be supposed to have known the circumstances of his princi-

[1] Bill *v.* Barker, 16 Gray, 62.

[2] Backhouse *v.* Hall, 6 Best & Smith, 507.

[3] State *v.* Boon, 44 Mo. 254.

[4] Shaw *v.* Vandusen, 5 Up. Can. Q. B. R. 353.

[5] Manhattan Gas Light Co. *v.* Ely, 39 Barb. (N.Y.) 174.

pals, their ability to pay, the power of an engine which could be profitably employed, and may have been willing to guaranty the contract first made, and totally unwilling to guaranty the substituted one.[1] All these cases are illustrations of the rule that the surety will only be bound to the extent, and in the manner, and under the circumstances that he consented to become liable. A party who guaranties a note signed by two, may, however, under certain circumstances, be liable for the default of one. Thus, A and B signed a note, B signing upon the express condition that he should not be bound unless C also signed the note as maker. C, knowing these facts, did not sign the note as maker, but guarantied its collection. B, by suit in chancery, had his name stricken from the note, because the terms upon which he signed had not been complied with, and C claimed that he was thereby discharged from his guaranty. Held, that as C knew B was not bound when he signed the guaranty, it was the same as if he had guarantied the note of A alone, and he was liable. "Where the surety knows that the undertaking of the principal is liable to be defeated, he must be considered as entering into his obligation with reference to such a contingency."[2]

§ 99. **Surety to or for firm not liable if partners changed—Surety for performance of award not liable if arbitrators changed.** —A surety for the good behavior of the clerk of a sole trader is not liable for his acts or defaults after the sole trader takes in a partner.[3] George Smith was doing business under the name of George Smith & Co., as banker, and employed Noble as teller in the bank, Noble giving bond with sureties for his conduct. Afterwards Smith entered into a contract with Willard such as the court held constituted them partners. The firm name continued the same, and Noble continued teller the same, and after the arrangement with Willard, became a defaulter. Held, the sureties were not liable for such default. The court said: "The money then which Noble abstracted was not Smith's, but it belonged to Smith and Willard. Smith alone is the obligor in the bond, and the sureties only undertook for the principal that he should act with fidelity to Smith, when in his employ alone. They never undertook to answer for him when in the employ of

[1] Grant v. Smith, 46 New York, 93.

[2] Sterns v. Marks, 35 Barb. (N. Y.) 565, per Morgan, J.

[3] Wright v. Russell, 2 W. Blackstone, 934.

Smith and Willard, or of any other person than Smith."[1] B, C and J, who were partners, being appointed agents for the sale of certain books, gave bond with sureties, conditioned that they and the survivors, and survivors of them, and such other person and persons as should, or might at any time thereafter, in partnership with them, or any, or either of them, act as agents for selling books, would duly account. J retired from the partnership, and it was held that the sureties were not liable for any subsequent acts of B and C.[2] The condition of a bond recited that the obligor had "taken and employed * (A) as a servant, and in the nature of a clerk to him * (obligee), and likewise as his book keeper;" and provided that A should serve faithfully and account for all money, etc., to the obligee and his executors. Held, the surety in the bond was not liable for money received by A after the death of the obligee, although he was continued in the same employment by the obligee's executor. No service, except to the obligee was contemplated, although it might have become necessary to account to his executors.[3] Two parties agreed to leave a matter in dispute between them, to certain arbitrators named, or a majority of them, and one of the parties gave bond with sureties that he would perform the award. Afterwards, without the knowledge of the sureties, two new arbitrators were substituted, and an award was rendered, a majority of the original arbitrators concurring therein. Held, the sureties were not liable for the award.[4]

§ 100. **When surety for the acts of one person liable if such acts performed by him and a partner.**—Under certain circumstances a surety for the acts of one person will be held liable for such acts, even though they are performed by such person as the partner of another. Thus, the defendant executed a bond of indemnity, conditioned that one F, who had been appointed by the plaintiffs their general agents to sell sewing machines, should pay over the proceeds of the sales. F, after his appointment, took in a partner. The plaintiffs knew of this, and the machines were afterwards delivered at the firm's place of business, but they were all delivered on the order of F, and charged to his individual account. In an action on the bond, it was held, that while the

[1] Barnett v. Smith, 17 Ill. 565, per Caton, J.

[2] University of Cambridge v. Baldwin, 5 Mees. & Wels. 580.

[3] Barker v. Parker, 1 Durn. & East, 287.

[4] Mackay v. Dodge, 5 Ala. 388.

surety would not have been bound for the acts of any firm, as such, of which F might be a member, yet the agencies employed by F in disposing of the machines, did not change his relations with his principals so long as they confined their dealings to him, and the delivery of the goods at the place of business of the firm was not sufficient to establish that they changed, or intended to change such relations, as they could not have based a refusal to deliver upon the ground that F had taken a partner.[1] A agreed with B, an attorney, to pay him for all such services as he had rendered, or should render C. Afterwards B took in a partner, and rendered services for C, in the pay for which his partner was entitled to share, but the services were rendered by B: Held, A was liable for the services. The fact that B's partner was entitled to receive part of the money for the latter services rendered by B, made no difference.[2] By law, no one but persons licensed for that purpose had authority to sell goods at auction, and a licensed auctioneer had to give bonds. A, being a licensed auctioneer, gave bonds with surety, but was conducting the business in the name of A & B as partners, B not being licensed: Held, the sureties of A were liable for goods thus sold by him. As no one but a licensed auctioneer could legally sell goods at auction, if they were properly sold, it must be considered the act of A, "and the obligation which he and his sureties contracted in consequence of the privilege granted to him by the government, ought not to be impaired by the circumstance of his having conducted the affairs of his office with the aid of a partner in the profits, any more than they would be if he had acted by the assistance of a hired clerk. His situation in relation to his partner did not concern the public who applied to him as an auctioneer."[3] These decisions do not controvert the rule that the surety for a single individual is not liable for a partnership of which such individual is a member, but each case, from its peculiar circumstances, was held not to come within the rule.

§ 101. **When obligation given by surety to firm, binds him after change in firm.**—An obligation given to a firm, securing it against loss from the acts or default of another, is sometimes held

[1] Palmer v. Bagg, 56 New York, 523. See, generally, as to liability of guarantor of sewing machine contract, Davis Sewing Machine Co. v. McGinnis, 45 Iowa, 538.

[2] Roberts v. Griswold, 35 Vt. 496.

[3] Kuhn v. Abat, 14 Martin (La.) 2 N. S. 168, per Mathews, J.

to bind the obligor for matters occurring subsequent to a change in the members of the firm. Thus, a principal and three sureties signed a promissory note, payable on demand to a firm "or order," for 300*l*. The note was made for the purpose of enabling the principal to obtain credit with the firm. Held, that the note being payable to the members of the firm, or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the firm.[1] A bond recited that the plaintiff "had agreed to take one Philip Jones into their service and employ, as a clerk in their shop and counting house," and was conditioned that he should account "for and pay the plaintiffs all sums of money," etc. Subsequently, a new partner was taken into the firm of the plaintiffs, and Jones afterwards made default. Held, the sureties were liable for such default. The court said the security was intended to be given to the house, as a house, and "the circumstance of taking in a new partner, makes no difference, either as to the quantity of business or the extent of the engagement. He continues to carry on the business of the plaintiffs, and this contract is coextensive with his continuance in the house. This is a security to the house of the plaintiffs, and no change of partners will discharge the obligor."[2] This decision can only be sustained upon the ground that it was the intention of the parties, and the effect of the obligation, to give the security to the house as a house, the same as if it had been a corporation, and regardless of who might compose it. A surety executed a bond conditioned for the faithful service of a clerk to a railway company. While the service continued, that company and another railway company were dissolved and united into one company, by a statute which provided that all bonds, etc., made in favor of or by the dissolved companies, should inure to the benefit of and bind the new company. Held, the surety was liable for a default of the clerk after the union of the two companies. The court placed its decision entirely on the words of the statute, and said it made the bond the same as if the name of the amalgamated companies had been mentioned therein.[3] Where a bond is directed by statute, to be

[1] Pease *v.* Hirst, 10 Barn. & Cress. 122.

[2] Per Mansfield, C. J., in Barclay *v.* Lucas, 1 Durn. & East, 291, note; *Id.* 3 Douglas, 321.

[3] Eastern Union Railway Co. *v* Cochrane, 9 Wels, Hurl. & Gor. 197.

taken by a corporate body, but no form is prescribed, it is good, though taken in the names of the individual members thereof as obligees.[1]

§ 102. **Surety not liable beyond scope of his obligation—Instances.**—A written guaranty of "the payments of all powder consigned" to a certain person for sale, does not render the guarantor liable for a sale to the consignee, of the powder remaining unsold upon closing the account between the consignor and the consignee.[2] A guaranty of the payment of a certain sum of money in consideration of the building of a bridge by a county, at a place then fixed by a report of viewers, is not binding, if the bridge is built at another place.[3] A guaranty that O would consign the plaintiffs sugar to the value of $30,000, does not, in case of the failure of O therein, bind the guarantors for more than the $30,000, as for commissions on the advances made to O on the faith of the guarantied consignment, and for exchange, etc. If O had consigned the sugar the guarantor would not have been liable at all, and his liability cannot exceed the stipulated value of the sugar.[4] A party guarantied the payment for gold with which the plaintiff should supply a goldsmith, for the purposes of his trade. The plaintiff discounted bills for the goldsmith, and gave him for them part gold and part money. The gold was applied to the goldsmith's trade, but he did not indorse the bills. Held, the guarantor was not liable for the gold so furnished. He meant only to pay for gold sold the goldsmith, and this was not sold but paid on the purchase of bills of exchange.[5] A guarantor of payment of any loss which may arise, by reason of the sale of goods, which by stipulation between the principal parties are to be sold within ninety days, is not liable, if by agreement between such parties, the goods are not sold within that time, and the time for sale is extended to one hundred and eighty days.[6] A guaranty provided that the guarantor would be answerable to the plaintiffs to the extent of 5000*l*, for the use of the house of S. & Co. When the guaranty was given S. & Co. were indebted to the plaintiffs, for which the plaintiffs held their notes

[1] Greenfield v. Yeates, 2 Rawle, (Pa.) 158.

[2] Carkin v. Savory, 14 Gray, 528; to same effect, see Wilson v. Edwards, 6 Lansing (N. Y.) 134.

[3] Mercer County v. Coovert, 6 Watts & Serg. (Pa.) 70.

[4] Dunlop v. Gordon, 10 La. An. 243.

[5] Evans v. Whyle, 5 Bing. 485; *Id.* 3 Moore & Payne, 130.

[6] Fisher v. Cutter, 20 Mo. 206.

and bills. Upon receiving the guaranty the plaintiffs canceled the notes, and delivered up the bills to S. & Co., and S. & Co. thereupon delivered the bills and a new note back to the plaintiffs, but no money passed. Held, the guaranty only contemplated future loans to S. & Co., and the transaction did not amount to a loan which would charge the guarantor.[1] The defendant was surety by a bond to the plaintiff for the performance of a contract by S., according to an agreement which provided that S. was to be paid by instalments, and one-fourth retained till after the work was done. The plaintiffs made advances to S not called for by the contract, and in excess of the work done by him. S failed to complete the work, and the plaintiffs got others to complete it. The amount paid to S and the last contractor exceeded the contract price, but the value of the work done by S and the price paid the last contractor, did not together equal the contract price. Held, the plaintiff could recover nothing on the guaranty. The advances made by him to S were made in his own wrong, and he must lose them.[2] Sureties for the faithful performance of his duties, by the freight agent of a railroad company, are not responsible for money received by another person appointed by the railroad company, and in its employ at the same station, but who is under the orders of such freight agent.[3]

§ 103. **Liability of surety or guarantor—Special cases.**—A guaranty was as follows: "I will be accountable to you for payment within six months of the seed order forwarded by my son, R. A. H., and also for payment within three months of 600 barrels of vetches, to be forwarded by the first steamer." The seeds were furnished and the vetches were not: Held, the seeds might be recovered for, as the contract was not entire. That portion concerning the vetches was distinct from the other, to be paid for in a different time, etc.[4] The condition of a bond executed by E to the F. & M. Bank, was that A shall and will from time to time ask for and receive from said bank, certain sums of money, at no time exceeding $5,000. Now if said A shall well and truly pay, or cause to be paid to said bank, all such sums as he may as aforesaid receive, then the obligation to be void, etc.:

[1] Glyn v. Hertel, 8 Taunton, 208.

[2] Warre v. Calvert, 2 Nev. & Per. 126; Id. 7 Adol. & Ell. 143.

[3] C. & A. R. R. Co. v. Higgins, 58 Ill. 128.

[4] Nash v. Hartland, 2 Irish Law Rep. 190.

Held, taking the whole instrument together, it was the intention of E to restrict the whole amount of the indebtedness of A to the bank, at any one time, to $5,000, and the bank having allowed him to become indebted in a larger amount, E was not liable at all. E may have thought that A could not successfully handle more than $5,000; and such may have been the fact. Having restricted his liability, he could only be held to his contract as he had made it.[1] In a case very similar to this, it was held that the surety was liable for the amount specified in the bond, notwithstanding a greater sum had been advanced. The court said if it was intended that a greater advance than the sum mentioned in the bond should avoid it, then the bond should have said so.[2] These cases do not differ in principle. The court, in one case, held that the intention of the surety appeared, from the instrument, to be that he should not be bound at all if a greater sum than that stipulated was advanced. In the other case, the court held that no such intention appeared. A guarantor for the price of goods ordered, but not yet sent, is not discharged, by the fact that the purchaser, upon receiving the goods, was dissatisfied with them, but finally agreed to keep them upon the seller deducting ten per cent. from the original price.[3] A guaranty of the payment of different kinds of goods, to be sold on a credit of six months, does not render the guarantor liable for anything, if one kind of the goods is sold on a credit of four, and another on a credit of six months. The guaranty offered was entire, and if not accepted as offered, it could not be accepted at all, and there was no contract.[4] Where the contract, the performance of which is guarantied, provides for notes at four months to be renewed, if desired, for sixty day, at eight per cent. interest, the guarantor is not holden for notes running six months, with interest for four months, at seven per cent., and thereafter at eight per cent.; nor for six months' notes with interest, at eight per cent., commencing four months after date.[5] So, a guarantor for the price of goods to be sold on a credit of six months, is not liable, if the goods are so sold, but afterwards the term of credit is, by agreement between the purchaser and seller, lengthened as to a part and shortened as to another part.[6] A surety who agrees

[1] Farmers and Mechanics' Bank *v.* Evans, 4 Barb. (N. Y.) 487.

[2] Parker *v.* Wise, 6 Maule & Sel. 239.

[3] Rice *v.* Filene, 6 Allen, 230.

[4] Leeds *v.* Dunn, 10 New York, 469.

[5] Locke *v.* McVean, 33 Mich. 473.

[6] Henderson *v.* Marvin, 31 Barb. (N. Y.) 297.

to indemnify A if he will give his drafts at three months to B, in order to enable B to raise money to pay C, is not liable, if A give B the money, instead of the drafts, to pay C, and B with the money pays C.[1] The reason is, that B became immediately liable to A for the money so advanced, when, if the original agreement had been carried out, such liability would not have arisen for three months, and this time may have been of great value to B. It made no difference that three months' time was actually given B, for there was no certainty that it would be given. A guaranty as follows: "I hereby guaranty the payment of any purchases of bagging and rope which * may have occasion to make between this and the first of December next," extends the liability of the guarantor to purchases upon a reasonable credit made before the first of December, although the time of payment was not to arrive till after that day.[2] When a guarantor agrees to be responsible for a bill of goods to be sold on three months' credit, he is liable, if the seller take the note of the purchaser, at three months, for the goods. It was a credit of three months, as usually understood in the commercial world, and the fact that the note had three days of grace after the expiration of the three months, made no difference, as no business man would have thought of cutting off the days of grace.[3] A gave B the following guaranty: "I have given C an order to purchase cotton, and * I have, in such case, to request that you will honor his drafts to the amount of those he may send to you for sale on my account, and I engage that his bills on me so transmitted shall be regularly accepted and paid." Held, the guarantor was liable for drafts drawn by C on A, and honored by B, on the representation of C that they were for A's benefit, when they were not so in fact. The fair construction of the guaranty was, that A would be liable for such bills as C should represent he had drawn on A's account.[4]

§ 104. **When surety cannot set up illegal acts of creditor or principal as a defense.**—A contract, providing for the return to the owner who had loaned them, of certain shares of railroad stock, and for the payment of interest for their use, was signed

[1] Bonser v. Cox, 6 Beavan, 110; see, also, 4 Beavan, 379.

[2] Louisville Manuf. Co. v. Welch, 10 Howard (U. S.) 461.

[3] Smith v. Dann, 6 Hill (N. Y.) 543.

[4] Ogden v. Aspinall, 7 Dow. & Ryland, 637.

in the name of the railroad company, which borrowed them by its president, and guarantied by certain parties. Held, the guarantors were estopped to deny that the president of the company had authority to sign the contract. By guarantying the contract, they had in substance asserted its validity, and to permit them to deny it would be to allow them to take advantage of their own wrong.[1] The teller of a bank had authority to issue due bills for the bank, for a special purpose, and issued such bills, not for such purpose, but to raise money for himself. Held, that neither he nor his surety could set up a want of power in the bank to issue them. The teller and his sureties were "not as parties to the instrument entitled to contest them, although they were issued for the bank in the name of the teller. As well might the teller contend that as he committed a fraud, the bank was not bound by his act. This he could not be heard to do."[2] A party was, by resolution of a city council, appointed the city's agent to negotiate certain bonds of the city on specified terms. The agent accepted the trust and gave bond with sureties for the faithful performance of his duties. He afterwards borrowed $5,000 for thirty days, for which he gave the city's note, and put up as collateral thereto, $21,000 of city bonds. This money he did not pay over. The city paid the note for $5,000, and took up the bonds, and sued the surety of the agent for the $5,000. Held, he was liable, and it made no difference, under the circumstances, whether the bonds were legally or illegally issued by the city, nor whether or not it was bound by the note, signed by the agent. The city adopted the act of the agent, and paid the note to save its credit, and he and his sureties were liable for the money received by him.[3] But where the seller and purchaser of a national bank had both been guilty of acts in the purchase and sale which were prohibited by the banking act, and impaired the value of the bank, it was held that the surety of the purchaser was not liable, and this, although the purchaser did not seek to rescind the contract. Both the creditor and principal had been guilty of an act prohibited by law, which was injurious to the surety, and the equity of the surety to a discharge, did not depend upon the fact that the principal should desire to rescind the contract.[4]

[1] Simons v. Steele, 36 New Hamp. 73.

[2] Wayne v. Com. Natl. Bank, 52 Pa. St. 343, per Thompson, J.

[3] City of Indianapolis v. Skeen, 17 Ind. 628.

[4] Denison v. Gibson, 24 Mich. 187.

§ 105. **When surety not liable for specific performance—Surety not charged to exonerate estate of principal—Other cases.** —A second tenant in tail joined in a mortgage and bond with the first tenant in tail, who received the money lent thereon. The first tenant in tail died, and it was held that his creditors could not, by bill in equity, have the money secured by the mortgage made out of the mortgaged premises, so as to exonerate the personal estate of the first tenant in tail.[1] A held two mortgages on the same property, each of them to secure a separate note. He sold the second mortgage, and the note secured by it, to B, and guarantied the payment of the note; and transferred the other note and mortgage to C, as collateral security. Held, the guaranty of the note which A sold to B, did not give such note, and the mortgage securing it, a preference over the other. The only effect of the guaranty was to render A personally liable.[2] A owed B two notes, each for 1,000*l*, on one of which C was surety. A had a security up with B for both debts, and became bankrupt. B proved both claims against his estate, and received a dividend, and also received a certain sum from the security. Held, C was only liable for one-half the sum proved by B against A's estate, after deducting therefrom one-half of both sums received by B.[3] A purchased land from C, and gave his note with B as surety for the purchase money, C also retaining a lien on the land to secure the purchase money. A became insolvent, and the land was sold under execution, and purchased by D. Afterwards, C obtained judgment on the note, against A and B, and levied his execution on the land. Held, D could not compel C to exhaust the property of B before selling the land. If B had paid the debt, he would immediately have been subrogated to C's lien, and D would have been in no better position.[4] A party gave bond with surety, to convey two hundred acres of land, situated within a certain district. Upon default of the principal, it was held that the surety could not be compelled to specifically perform the contract by conveying land of his own, although he owned more than the required amount and kind within the prescribed district. The surety covenanted that the principal, not himself, would convey. He could only be held liable in damages, and not for a specific

[1] Robinson *v.* Gee, 1 Vesey Sr. 251.

[2] Gausen *v.* Tomlinson, 8 E. C. Green, (N. J.) 405.

[3] Coates *v.* Coates, 33 Beavan, 249.

[4] Cole County *v.* Angney, 12 Mo. 132.

performance.[1] Three parties purchased jointly, separate lots of ground, and each gave his notes for one-third of the amount. The act of sale declared that each had a one-third interest in the property, and provided "that to secure the payment of the aforesaid notes, the purchasers hereby mortgage the herein described property." Two of the purchasers paid their notes, and it was held that their land could not be sold to pay the note of the third. The court said it was the same as if each had given a separate mortgage on his portion of the land, and when any one paid, it operated the release of his land.[2] But where two joint owners of a piece of land jointly mortgaged it to secure the several notes of each of them, it was held that the interest of both might be sold to pay the note of one.[3]

§106. **What payment by person indemnified will charge surety —When surety liable for costs—Other cases.**—When a party indemnified by bond with surety, against the payment of money, is obliged to pay it, and does pay it by giving his negotiable note, which is accepted as payment, he may sue the surety, and recover the same as if he had paid in money.[4] The guarantor of a note is not liable for protest fees, because protest is not necessary in order to fix his liability.[5] Nor is the guarantor of a note, who is absolutely liable, without any suit against the maker, chargeable with the costs of such a suit.[6] But where one partner by bond with surety, agreed to pay all the firm debts, and failed to do so, and the retiring partner was arrested in another state for one of the debts, and paid the debt and costs, it was held, that the surety was liable for such costs.[7] A guaranty was as follows: "Gentlemen, you will please to credit Mr. A to the extent of 30*l*, monthly, from time to time, and in default of his not paying, I will be accountable for the above amount." Held, the guaranty was not limited to 30*l* in all, but authorized an advance of 30*l* every month, even though the aggregate indebtedness might amount to much more than 30*l*.[8] Where a lease provided for

[1] Johnson *v.* Hobson, 1 Littell (Ky.) 314.

[2] Erwin *v.* Greene, 5 Robinson (La.) 70.

[3] Hunt *v.* McConnell, 1 T. B. Monroe (Ky.) 219.

[4] Lee *v.* Clark, 1 Hill (N. Y.) 56; Gage *v.* Lewis, 68 Ill. 604.

[5] Woolley *v.* VanVolkenburgh, 16 Kansas, 20.

[6] Woodstock Bank *v.* Downer, 27 Vt. 539.

[7] Wright *v.* Sewall, 9 Robinson. (La.) 128.

[8] Tennant *v.* Orr, 15 Irish Com. Law R. 397.

the payment of rent in monthly installments, and a party guarantied the prompt performance of all the covenants thereof by the lessee, the guarantor is liable, and may be sued for the rent each month as it becomes due.[1] Where one who has contracted with A to indemnify and keep him harmless as to "liabilities" incurred by him as indorser for B, permits a judgment to be taken against A on such indorsement, it is not necessary that the judgment should have been collected to enable A to maintain an action for breach of the contract.[2] A note was guarantied to be "good and collectible two years." Held, the guaranty covered the period of two years after the maturity of the note, as the note was not collectible till it was due.[3] Where a bond of $1,000 is required of an accused person, and he gives such a bond, in which each of the two sureties becomes bound for $500, the bond is valid.[4]

§ 107. **Surety not liable for greater sum than principal—Other cases.**—A surety who signs in the absence, and without the knowledge of the principal, is bound.[5] A guaranty may have a retrospective operation, where it appears from the instrument that such was the intention of the parties; and an instrument may be ante-dated, so as to embrace a particular transaction; and the date of the instrument is evidence of the time when the parties intended it to take effect.[6] Suit was commenced against the principal and one surety, on a paymaster's official bond, and judgment for $10,000 recovered. Afterwards suit was brought against another surety on the bond, and a greater recovery than $10,000 claimed. Held, that as the liability of the principal was fixed at $10,000 by the first judgment, the surety in the last suit could not be held liable for more. Otherwise the surety would be held to a greater liability than the principal.[7] If the consideration upon which a surety signs fails, he is discharged, and may come into equity and have his obligation canceled.[8] A common money bond, payable on demand, given by a principal and surety,

[1] Binz v. Tyler, 79 Ill. 248.

[2] Smith v. Chicago & N. W. R. R. Co., 18 Wis. 17.

[3] Marsh v. Day, 18 Pick. 321. As to liability of the surety on a bond "to be binding only one year from date, see Davis v. Copeland, 67 New York, 127.

[4] Moore v. The State, 28 Ark. 480.

[5] Hughes v. Littlefield, 18 Me. 400.

[6] Abrams v. Pomeroy, 13 Ill. 133.

[7] United States v. Allsbury, 4 Wallace, 186.

[8] Cooper v. Joel, 1 De Gex, Fish. & Jo. 240.

the creditor of the principal, is presumed to be isting debt, and not to cover future advances by he principal.[1] When a surety, who had an oppor- t, but did not, signed a bond for the payment of g it, from the representations of the principal, to be a bond for the delivery of attached property, he is guilty of such gross negligence as will prevent him from having relief in equity against the bond.[2] A guarantor that a party shall not become bankrupt, is not liable, unless a commission of bankruptcy is sued out against such party.[3] The same causes which will discharge a surety on a promissory note, will ordinarily discharge an indorser of the same.[4] If a note is void for usury, a guaranty thereof, which has no other consideration than the note, is also void for the usury.[5]

§ 108. **Sureties on assignee's bond not liable to those who defeat the assignment—Principal cannot allege for error that surety is discharged—Other cases.**—The sureties on the bond of an assignee, given pursuant to a statute with reference to voluntary assignments for the benefit of creditors, are not liable for the failure of their principal to account for the assets in his hands, as required by a judgment in favor of creditors declaring the assignment void as to them, and directing the assignee to pay over the assets and avails thereof in his hands, to be applied in satisfaction of their claims. The bond was not intended for the benefit of persons who attacked and defeated the assignment, and thereby defeated the trust, but was for the good behavior of the assignee as trustee under the assignment.[6] When the surety is discharged on the trial of a case against principal and surety, in the court below, the principal cannot allege for error in the court above such discharge of the surety. "The release of the surety, whether erroneous or not, could in no wise prejudice the defendant, or affect his liability as principal, and he will not, therefore, be heard to complain of it."[7] The surety on a note given for the price of a horse, and which is void because it is payable in confederate money, is not liable on the note, because it is void; nor is he liable for the price of the horse, because his only liability existed by

[1] Walker v. Hardman, 4 Clark & Finnelly, 258.

[2] Glenn v. Statler, 42 Iowa, 107.

[3] Bulkeley v. Lord, 2 Starkie, 406.

[4] Smith v. Rice, 27 Mo. 505.

[5] Heidenheimer v. Mayer, 10 Jones & Spen. (N. Y.) 506.

[6] People v. Chalmers, 60 New York, 154.

[7] Fewlass v. Abbott, 28 Mich. 270.

virtue of the note.[1] A surety is bound to ascertain his principal, and where, by mistake, he signs a bond for the lessee of a telegraph company instead of for the company, to release property from attachment, he will be bound.[2] If it is agreed that a certain party shall be surety on a bond to a sheriff, and a blank bond is taken to him and he signs it, and dies, and afterwards the bond is filled up according to the agreement, and delivered to the sheriff, the estate of the surety is liable on the bond. As the surety had been previously agreed upon, the contract was complete as soon as the surety signed.[3] The sureties on the bond of an assignee for the benefit of creditors, which provides that the assignee shall "faithfully execute the trusts confided to him," are concluded by the final decree of a court upon the account of the assignee, by which he is directed to pay the claim of a specific creditor.[4] It has been held that the fact that a voluntary bond is not stamped, is no defense to the sureties therein. They or their principal should have stamped it.[5]

§ 109. **When surety released if creditor and principal intermarry.—Surety not liable to party who pays debt at principal's request—Other cases.**—A party who, at the request of the principal alone, pays the debt for which a principal and surety are bound, cannot usually collect the amount so paid from the surety. Thus, where an executor, supposing the estate of his testator to be solvent, paid in full a debt due by the testator on which there was a surety, it was held that the executor could not, upon the estate proving insolvent, recover any portion of the sum so paid from the surety.[6] A as principal, with others as his sureties, executed a note to B, a feme sole, and afterwards A and B intermarried; under the provisions of an ante-nuptial contract between them, the note did not pass to A upon the marriage, but remained the separate property of B. Held, that upon the marriage the wife lost her remedy by action against the husband, and the sureties were thereby discharged.[7] A creditor authorized his agent, B, to administer on the estates of any of his debtors

[1] Shepard v. Taylor, 35 Texas, 774.

[2] Doane v. Telegraph Co., 11 La. An. 504.

[3] Wells v. Moore, 3 Robinson, (La.) 156.

[4] Little v. The Commonwealth, 48 Pa. St. 337.

[5] McGovern v. Hoesback, 53 Pa. St. 176.

[6] Paine v. Drury, 19 Pick. 400. Holding the same principle with reference to the surety on a distiller's bond, see Elmendorph v. Tappen, 5 Johns, 176.

[7] Govan v. Moore, 30 Ark. 667.

who might die intestate. B administered on one of those estates' and gave bond with C as surety for the faithful performance of his duty as administrator. B used the funds of the estate and became bankrupt. Held, C was not liable to the creditor for B's default. B was the agent of the creditor, and represented him in that regard. C was therefore the surety of the creditor, and the creditor had no cause of action against his own surety.[1]

§ 110. **When agreement to pay in good notes not guaranty that notes in which payment is made are good—Other cases.**— Where, in an agreement for the sale of goods, it was stipulated that a part of the purchase money should be paid in "good obligations," and certain notes were tendered to the seller, and received and receipted for by him "on payment of goods," there is no guaranty of the solvency of the makers of such notes. The insertion of the word "good" implied no guaranty, but gave the seller a right to refuse notes which did not answer that description; and having received the notes as good, and receipted for them, he has not, in the absence of fraud, any claim upon the purchaser."[2] A guaranty was as follows: "This may certify that we, being acquainted with Frank Stevens, and reposing great confidence in his honesty, and the goods you may see fit to entrust him with, we will hold ourselves good for, provided he should sell them and abscond with the money, or squander them away; and this shall be your note against us:" Held, this was a mere guaranty of the honesty of Stevens. The guarantors were not liable, unless Stevens sold the goods and absconded, or squandered them; and a failure to pay for the goods was not evidence that they had been squandered.[3] A guaranty that the owner of stock

[1] Moodie *v.* Penman, 3 Dessaussure, Eq. (So. Car.) 482. As to when guaranty covers past advances as well as future ones, see Morrell *v.* Cowan, Law Rep. 6 Eq. Div. 166. Holding, that a surety for a suit to be commenced at the next term of court, is not liable for a suit commenced at the third term, see Hibbs *v.* Rue, 4 Pa. St. 348. To the effect that a surety cannot prevent a judgment against the principal from being amended, see, Pryor *v.* Leonard, 57 Ga. 136. As to when a guaranty, which by its terms is not to be produced till the death of the parties, is valid if produced before, see, Washburn *v.* Van Norden, 28 La. An. 768. Holding, that where a surety is paid by the principal, the amount of a debt for which he is liable, and thereupon agrees to pay the creditor, he becomes the principal, and the principal becomes the surety, as between them, see Coggeshall *v.* Ruggles, 62 Ill. 401.

[2] Corbet *v.* Evans, 25 Pa. St. 310.

[3] McDougal *v.* Calef, 34 New Hamp. 534.

in a corporation shall receive dividends thereon of a specified amount, for a certain number of years, by paying to the guarantor all he receives above that amount, is valid. It is not a wager, but "not only in words, but also in its plain design, a guaranty to the plaintiffs of a certain yearly profit on railroad stock owned by them."[1] On a transfer of certain shares of railroad stock, the assignor guarantied "that said stock shall yield annually six per cent. dividends for the space of three years:" Held, this was a guaranty that the stock was equal in value to stock yielding annual dividends of six per cent., and not merely a guaranty that the assignee should receive six per cent. annually for three years on the par value of the stock. The measure of damages was the difference between the actual value of the stock assigned, and stock which would have yielded dividends of six per cent. for the three years.[2] A guaranty on a bond was as follows: "For value received, I guaranty the punctual payment of the interest on the within bond, and will pay the interest on demand in default of its payment by" * [the principal]. The bond was due in six and a half years, and the interest was payable semi-annually: Held, the guaranty only extended to the payment of interest falling due before the time of payment of the principal sum. If it was otherwise, and the bond was never paid, the guarantor would be liable for interest forever.[3] If the principal borrow money to pay a note, the law will not imply an authority in him from those who signed the note as sureties only, to borrow the money on the joint credit of the principal and sureties, nor a promise from the sureties to the lender to repay the money so borrowed.[4]

§ 111. **Surety for return of slave liable, if death of slave caused by principal—Other cases.**—A surety, who executes a bond for the hire of a slave, which contains a covenant for the return of the slave at the end of a year, is not discharged from his obligation to return the slave, by the fact that before the end of the year such slave dies in consequence of the inhuman treatment which he receives at the hands of the principal. The death of the slave was not the act of God or the owner. The principal and surety "are joint covenantors, equally bound

[1] Elliot *v.* Hayes, 8 Gray, 164, per Metcalf, J.

[2] Struthers *v.* Clark, 30 Pa. St. 210.

[3] Hamilton *v.* Van Rensselaer, 43 New York, 244; Melick *v.* Knox, 44 New York, 676.

[4] Rolfe *v.* Lamb, 16 Vt. 514.

for the performance of the covenant, and neither can exonerate himself from liability, on the ground that the wrongful act of the other has rendered a performance by him impossible."[1] A party wrote a letter introducing another, stating that he wanted to purchase a certain amount of goods, and concluding "I consider him perfectly good, and if required, will indorse for him to that amount." Held, he was not liable for goods sold on the strength of this letter, unless he had been requested to indorse, and had refused. The guaranty was conditional, to be created by indorsement, if required, and the protection of the party writing the letter may have depended upon the form of the security.[2] A bond provided that a secretary of state should return certain fees, if it should be decided by the legislature or supreme court, that they were not chargeable to a fund commissioner. Held, the sureties were not liable, unless the legislature or supreme court decided as provided in the bond. A decision by one house of the legislature was not sufficient, and neither the sureties nor their principal were bound to procure the decision.[3] A covenant to indemnify A against all damages and costs which he may incur in consequence of indorsing any notes of B, past or prospective, relates only to indorsements made by A, for the accommodation and at the request of B, and does not extend to indorsements by A of notes given him by B, for debts of B, due to A.[4] A statute concerning paupers, provided that a settlement might be gained "by any person, who shall *bona fide* take a lease of any real estate, of the yearly value of ten dollars, and shall dwell upon the same one whole year, and pay the said rent." A took a lease of ground for a year at a rent of $1 a month, and paid $1.50 rent himself, and his surety B paid the balance. Held, this was sufficient to entitle A to a settlement. It was the same as if A had borrowed the money from B, and paid the rent.[5] Upon a bond conditioned that one J should pay to plaintiffs monthly, "and every month during the time for which he should act as their agent, all moneys which he then had received or which he should receive for premiums, etc., and should repay to the applicants all moneys which he had then re-

[1] Carney *v.* Walden, 16 B. Mon. (Ky.) 388, per Simpson, J.

[2] Stockbridge *v.* Schoonmaker, 45 Barb. (N. Y.) 100.

[3] Field *v.* Rawlings, 1 Gilm. (Ill.) 581.

[4] Trask *v.* Mills, 7 Cush. 552.

[5] Butler *v.* Sugarloaf, 6 Pa. St. 262.

ceived or should receive for insurances not accepted by the plaintiffs, and should in all things well and faithfully conduct himself as their agent," it was held the sureties were only liable for moneys received after the bond was executed.[1]

§ 112. **Surety for balance which may remain due after sale of property not liable till completed sale made—Other cases.**—An executor's bond, describing the testator as James L. Findley, cannot by parol evidence be made applicable to the estate of Joseph L. Findley, although it was the intention to give the bond in the estate of the latter, and the mistake was a clerical error.[2] In consideration that the plaintiff would advance 1,200*l* to a third person, upon mortgage of certain leasehold premises, the defendant promised that if, after any "sale" of said premises, duly made, the premises did not pay the debt, the defendant would immediately make good the difference. The premises were put up for sale, and knocked down to W for 650*l*, who paid a deposit of 100*l*, and signed the usual contract, but afterwards refused to complete the purchase, and the plaintiff sued him on the contract, which suit was pending. The plaintiff then sued the defendant on the guaranty. Held, the suit was premature, and could not be sustained. The word "sale" meant a completed sale. Otherwise there was no means of ascertaining the damage.[3] A guaranty on the back of a bond was as follows: "I * do hereby guaranty and bind myself and heirs to * for the payment of the amount of the within bond." The condition of the bond was that the obligors should at a certain time pay a sum of money, "on receiving from the obligee a title" to certain land. Held, the covenants were mutual, and dependent, and the plaintiff could not recover without showing a tender of a deed for the land to the obligor.[4] A covenanted with B that C should sell and account for all merchandise which B might put into his hands. B

[1] Canada West, etc. Ins. Co. *v.* Merritt, 20 Up. Can. Q. B. R. 444. As to what is guaranty and not an original undertaking, see Kellogg *v.* Stockton, 29 Pa. St. 460. As to when sureties of life insurance agent are not liable for renewal premiums received by him, see Crapo *v.* Brown, 40 Iowa 487. As to what must be stated in declaration against guarantor that a note is collectible, see Sylvester *v.* Downer, 18 Vt. 32.

[2] McGovney *v.* The State, 20 Ohio, 93. The guaranty must be strictly complied with, or the guarantor is not liable, Bigelow *v.* Benton, 14 Barb. (N. Y.) 123.

[3] Moor *v.* Roberts, 3 J. Scott (N. S.) 830.

[4] Gardner *v.* King, 2 Ired. Law (Nor. Car.) 297.

settled with C, and a balance was found due from C, for which B took his note, due one day after date. Held, if the note was not paid, A was liable on his covenants for taking the note was nothing more than was reasonably within the contemplation of the parties.[1] If the payee of a note guaranties its collection, and transfers it, and afterwards takes it up, and then transfers it to another person, who agrees to take it at his own risk, but the guaranty is not erased, the payee is not liable to the holder on the guaranty. When the payee took up the note the guaranty became *functus officio*, and there was no contract of guaranty between the payee and the holder.[2]

§ 113. **When guaranty not revoked by death of guarantor—When surety cannot relieve himself from future liability by notice.**—When the engagement of a surety is a contract, and not a bare authority, it is not usually revoked by his death, and his estate remains liable, the same as he would have been if he had lived.[3] Thus, where a party became surety for a deputy sheriff, his estate was held liable for a breach committed three years after his death. The court said: "The efficacy of contracts does not cease upon the death of one of the contracting parties. * Whether a man undertakes for himself or others, in regard to future transactions, the contingency that death may remove him before the obligation can be fulfilled, must be in the contemplation of all parties, but it remains unaffected by that event."[4] A written continuing guaranty was given by A and B, which, by its terms, was to continue in force till revoked by written notice. A died, leaving a solvent estate, and four years after his death, no notice having been given, a liability was created, covered by the guaranty, which B had to pay, and he sued the estate of A for contribution. Held, he was entitled to recover. The court said: "What obstructs one from indemnifying against the consequences of an event which may not happen for more than four years after his death, more than giving his promissory note, which may not reach maturity for more than four years from his death? It is asked how long such a guaranty shall continue in

[1] Bush v. Critchfield, 5 Ohio, 109.

[2] Gallagher v. White, 31 Barb. (N. Y.) 92.

[3] Hightower v. Moore, 46 Ala. 387; White's Exrs. v. The Commonwealth, 39 Pa. St.; Royal Ins. Co. v. Davies, 40 Iowa, 469.

[4] Green v. Young, 8 Greenl. (Me.) 14, per Weston, J.

force, and the answer is, until it be ended according to its terms."[1] When a guaranty was as follows: "I request you will give credit in the usual way of your business, to L, and in consideration of your doing so, I hereby engage to guaranty the regular payment of the running balance of his account with you till I give you notice to the contrary, to the extent of 100*l* sterling," it was held that the estate of the guarantor was liable for goods supplied after his death.[2] A party who has entered into a contract as surety, cannot ordinarily, by notice, relieve himself from future liability for his principal, in the absence of a stipulation to that effect; thus, a party on taking in a clerk, took from him a bond with surety, for his good behavior. The time of service was not fixed, but it was to be determinable at the option of either the clerk or the employer. The surety died, and his executrix gave notice to the employer that she should no longer consider herself liable on the bond. The employer read the notice to the clerk, and required him to execute a new bond with another surety, which was done. Held,the estate of the first surety was liable for defaults of the clerk occurring after the notice was given. The employer did not agree to release the estate, and his acts upon receiving the notice, did not operate as such a release.[3] Upon a bond by a surety, conditioned for a collecting clerk's paying over money received by him from time to time, and at all times during his continuance in the service, it has been held that the surety cannot discharge himself from further liability, by giving notice on a particular day, that from thenceforward he will not remain surety. The court said if he desired to have the right to terminate his suretyship by notice, he should have so specified in his contract.[4] Where a guaranty was revocable, it was held it could not be revoked so as to prejudice the party who had already acted upon it, nor prevent him from renewing obligations which he had taken on the faith of it.[5] It has been held that a general guaranty continues in force till it is shown by the guarantor to have been rescinded.[6]

[1] Knotts *v.* Butler, 10 Richardson Eq. (So. Car.) 143, per Wardlaw, C. J.; to same effect, see Fennell *v.* McGuire, 21 Up. Can. C. P. R. 134.

[2] Bradbury *v.* Morgan, 1 Hurl. & Colt. 249; to similar effect, see Menard *v.* Scudder, 7 La. An. 385.

[3] Gordon *v.* Calvert, 2 Simons, 253; affirmed, 4 Russell, 581.

[4] Calvert *v.* Gordon, 3 Man. & Ryl. 124.

[5] Williams *v.* Reynolds, 11 La. (6 Curry) 230.

[6] Knight *v.* Fox, Morris (Iowa) 305.

If a wife mortgages her real estate for the debt of her husband, the land remains liable after her death.[1]

§ 114. **When death of guarantor revokes guaranty—When surety may terminate his liability by notice.**—One who guaranties the performance of a contract by another, has the right after the default of his principal, which would justify its termination, to require that the contract be terminated and the claim against himself as surety be confined to the damages then recoverable.[2] A surety upon an ordinary lease for one year (with provision that if there was a holding over, it should run for another year, unless the landlord sooner determined it, and upon which there had been such a holding, that the tenancy was one from year to year), gave three months notice in writing to the landlord, that at the expiration of the then current year, he would no longer be responsible for rent, and it was held that at the expiration of that year he was released from further liability.[3] It has been held, that the death of a person who has given a letter of credit, authorizing another to draw on him to a certain amount for a limited period, and agreeing to accept the drafts drawn, and pay them if not paid by the drawer at maturity, will operate as a revocation of all authority to thereafter draw on his credit so as to bind his estate, though the person to whom and for whose security the letter was given has no notice of his death, and the period for which the authority was given has not expired.[4] The court treated it as a question of agency, and said that the death of the principal revoked the authority of the agent; while admitting, that if there had been a contract, the death of the guarantor would not have affected it. It has also been held, that a guaranty to secure money to be advanced to a third party on discount to a certain extent for the space of twelve months, may be revoked within that time.[5] The court said the promise by itself created no obligation unless advances were made, and the fact that twelve months was mentioned in the guaranty, limited the time beyond which it should not extend, instead of making a binding contract for that time. Both these cases may well be sustained, by the fact that the writings in each were simply offers to guaranty, which

[1] Miner v. Graham, 24 Pa. St. 491.

[2] Hunt v. Roberts, 45 New York, 691.

[3] Estate of Desilver, 9 Phila. (Pa.) 302; to similar effect, see, Pleasanton's appeal, 75 Pa. St. 344.

[4] Michigan State Bank v. Estate of Leavenworth, 28 Vt. 209.

[5] Offord v. Davies, 12 J. Scott (N. S.) 748.

were only binding so far as they were acted on, and might at any time be revoked, the same as any other offer before it is accepted.[1] A guaranty was determinable by six months' notice, and the guarantor died, leaving as his executor the debtor, on whose behalf the guaranty was given. The creditors, knowing these facts, and also that there was no personal estate to answer the guaranty, continued to make advances to the debtor for two or three years. Held, the creditors could not recover against the guarantor's estate for any advances made after his death. This was not put upon the ground that the guarantor's death terminated the guaranty, for the court said it did not think that alone would terminate it, but upon the ground that when the creditor knew there was no personal estate, it would be presumed that the advances were not made on the guaranty, and that it would be grossly inequitable to allow the creditor to charge the real estate under the circumstances.[2] It has been held, that doubtful expressions in a subsequent correspondence should not be construed as revoking an explicit guaranty.[3]

§ 115. **When surety may be sued jointly with principal.**— When principal and surety are jointly liable on the same contract, they may be sued jointly for its enforcement, and this whether or not the fact of suretyship appears from the instrument.[4] A surety who signs a note made out in the singular number, "I promise," and adds to his name the word "surety," is liable in a joint suit with the maker, who has also signed the note.[5] But where sureties on a joint and several note had been released *pro tanto* by the creditor surrendering a security for the debt of less value than the debt, it was held that the principal and sureties could not be sued at law together, because, as the principal was liable for the full amount, and the sureties for only a portion, no judgment could be entered according to the liability of the parties.[6] A principal bound himself by bond for the payment of a certain sum of money. Immediately under the signature of the principal, on the same paper, certain sureties wrote: "We

[1] To this effect, see, also, Jordan *v.* Dobbins, 122 Mass. 168.

[2] Harriss *v.* Fawcett, Law Rep. 8, Chan. Appl. Cas. 866; see, also, same case in court below, Law Rep. 15, Eq. Cas. 311.

[3] Lanusse *v.* Barker, 3 Wheaton, 101.

[4] Kleckner *v.* Klapp, 2 Watts & Serg. (Pa.) 44; Craddock *v.* Armor, 10 Watts (Pa.) 258.

[5] Dart *v.* Sherwood, 7 Wis. 523.

[6] Cummings *v.* Little, 45 Me. 183.

hereby bind ourselves as security for said Olds (principal) for the full and faithful performance of the above agreement," and signed and sealed under these words. The bond was executed and delivered by principal and sureties at the same time and on the same consideration. Held, they were all liable together in one suit. The court said: "Where several persons execute an instrument in parol, or under seal, upon the same consideration, at the same time and for the same purpose, and taking effect from a single delivery, they are in legal effect joint contractors or obligors. * The particular form or manner in which the parties have affixed their signatures to a contract or bond, is immaterial. It matters not whether those who execute as sureties sign their names directly under that of the principal, and then append to each name the fact of signing merely as surety, or whether, as in this instance, the sureties write between their names and that of the principal that they sign as securities, and then affix their signatures."[1] The same thing was held, when at the foot of a money bond a surety had written: "I * join in the above obligation with * (principal) and am his security for the above sum of * ;"[2] and where, under a contract for the payment of wages, a surety wrote: "I * agree to stand as surety for * (principal) in the above agreement."[3] A and B, being partners, dissolved their partnership, and B executed an agreement to A that he would pay the firm debts. C signed this agreement with B, writing before his name the word "security." The firm was at the date of the agreement indebted to D, who sued A, B and C, in a joint action for his debt, and it was held they were liable, on the ground that C was a surety, and primarily liable, and the contract having been made for the benefit of the creditors of the firm, any of the creditors might sue on it.[4] Where a third party guarantied a lease, as follows: "For value received, I guaranty the payment of the rent, as stipulated by said * (principal), in case of non-payment by him;" it was held that the guarantor and lessee could not be sued jointly for rent. The court said: "The undertaking or contract of the guarantor was distinct from that of the principal and collateral

[1] Stage v. Olds, 12 Ohio, 158, per Read, J.; to same effect, see Leonard v. Sweetzer, 16 Ohio, 1.

[2] Atwell's Admr. v. Towles, 1 Munf. (Va.) 175.

[3] Watson v. Beabout, 18 Ind. 281.

[4] Dunlap v. McNeil, 35 Ind. 316.

thereto, and his liability dependent upon a contingency, namely: the non-payment of rent by the lessee."[1] The same thing was held where, under a lease, sureties wrote: "For the payment of said contract being fulfilled on the part of said * (principal), we, the undersigned, will become responsible;"[2] and where, on a lease under seal, a guaranty not under seal, was as follows: "I hereby become security for * (principal) for the rent specified in the within lease."[3] But where a party, not the lessee, joined in the execution of a lease, and guarantied on his part that the payments of rent should be made as they came due, it was held that he might be jointly sued with the lessee.[4] Where a stranger to a note payable in clocks, at the time of its execution, wrote on its back: "I guaranty the fulfillment of the within contract;"[5] and where, under similar circumstances, a stranger to a note payable to bearer, indorsed it: "For value received, I guaranty the payment of the within note, and waive notice of non-payment,"[6] it was held, that the maker and indorser might be sued jointly. But where a third party wrote on the back of a bond: "I do join with * (principal) as his security for the performance of the agreement mentioned in the present note," it was held, that he could not be sued jointly with the maker, on the ground that their undertakings were distinct and different.[7]

§ 116. **When recovery on common money counts cannot be had against surety—Surety for alimony cannot be compelled by motion to pay it—Other cases.**—A joint and several promissory note was signed by two, one adding to his name the word "surety." They were sued on the common money counts. Held, no recovery could be had on those counts against the surety. The court said: "The rule is nearly or quite universal that there can be no recovery against a surety where his character appears on the face of the instrument, without declaring specially on the contract. * In the common case of a suit against the makers of a promissory note, the instrument may be given in evidence under the money counts, for the reason that the note is evidence of money lent to or had and received by the makers to the plain-

[1] Virden v. Ellsworth, 15 Ind. 144, per Hanna, J.
[2] Cross v. Ballard, 46 Vt. 415.
[3] Turney v. Penn, 16 Ill. 485.
[4] McLott v. Savery, 11 Iowa, 323.
[5] Goles' Admx. v. Van Arman, 18 Ohio, 336.
[6] Prosser v. Laqueer, 4 Hill (N. Y.) 420.
[7] Preston v. Davis, 8 Ark. (3 Eng.) 167.

tiff's use. But when one of them signs as a surety for the other, and that fact appears on the face of the instrument, the note furnishes no evidence that he received the whole or any part of the consideration. Indeed, it proves the contrary."[1] Where a statute provided that the maker, drawer, indorser or acceptor of a bill of exchange or promissory note might be joined in one suit, it was held that this did not authorize a joint suit against the maker and guarantor of a promissory note,[2] it having been previously decided by the same court, that in the absence of a statute the maker and guarantor of a note could not be sued together.[3] A statute provided that in case of a foreclosure of a mortgage, a decree for any balance due after sale of the mortgaged premises, might be made against any of the parties to the suit who were liable. Held, that a mortgagee who assigned the mortgage and guarantied the debt, was a proper but not a necessary party to a suit to foreclose the mortgage, and a personal decree might be rendered against him for any deficiency.[4] Under nearly the same circumstances, it has been held that the guarantor was not a proper party to the foreclosure suit, and that no personal decree could be rendered against him.[5] The surety for alimony in a divorce suit cannot be compelled to pay the alimony by motion, but must be sued on his bond.[6]

§ 117. **When surety who is not liable at law will not be charged in equity.**—When the surety in a joint obligation dies, there is no remedy at law on the obligation against his estate, and in the absence of fraud or mistake, equity will not charge his estate with the payment of such obligation. Where an obligation is joint, and all the obligors participated in the consideration, or there is any previous equity which imposes a moral obligation to pay on all the obligors, there a court of equity will enforce the obligation against the estate of the deceased obligor, because the reasonable presumption is that the parties intended the obligation to be joint and several, but through fraud or mistake it was

[1] Butler v. Rawson, 1 Denio, 105, per Bronson, C. J.; to same effect, see Wells v. Girling, 8 Taunt. 737.

[2] Stewart v. Glenn, 5 Wis. 14.

[3] Ten Eyck v. Brown, 3 Pinney, (Wis.) 452; as to who may sue on a guaranty, see Jenness v. True, 30 Me. 438; as to when an agreement is collateral and not original, see Smith v. Hyde, 19 Vt. 54.

[4] Jarman v. Wiswall, 9 E. C. Green (N. J.) 267.

[5] Borden v. Gilbert, 13 Wis. 670.

[6] Appeal of Ernestine Guenther, 40 Wis. 115.

made joint only. But "this presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery." The surety may have had the obligation made joint, with express reference to the contingency of his death.[1] Where a joint appeal bond is signed by two sureties, and one of them dies, his estate is discharged from liability, both at law and in equity, and the fact that the bond was given in pursuance of a statute, does not affect the liability thereunder. In cases of suretyship, the contract is the measure of liability, and a statute under which it is made will not be so construed as to enlarge the obligation of the surety beyond the terms of his contract.[2] Principal and surety signed a joint and several bond, by which they bound themselves as "principals" for the conduct of the principal. Suit was brought on the bond jointly against the principal and surety, and a joint judgment was recovered against them. Afterwards the principal became insolvent, and the surety died. Held, that the remedy at law being gone against the estate of the surety, equity would not charge it. The bond was merged in the judgment, and after judgment the obligee could not have sued the principal and surety separately.[3] A mortgage to secure the debt of F. & Bro. to the complainant, was executed by F. and his wife on premises which were the separate property of the wife; afterwards the complainant executed a satisfaction of the mortgage, upon F.'s promise to give a new mortgage and obtain the wife's signature thereto, which signature, however, the wife refused to give. Held, the satisfaction would not be annulled, and the mortgage enforced against Mrs. F., she being only liable as surety, and there being no accident or mistake in the execution of the satisfaction, and no fraud on her part. The Court said: "The obligation of the surety is

[1] Pickersgill *v.* Lahens, 15 Wallace, 140, per Davis, J.; Harrison *v.* Field, 2 Wash. (Va.) 136; Risley *v.* Brown, 67 New York, 160; Pecker *v.* Julius, 2 Browne (Pa.) 31; Weaver *v.* Shryock, 6 Serg. and Rawle (Pa.) 262; Rawstone *v.* Parr, 3 Russell, 539; Kennedy *v.* Carpenter, 2 Wharton (Pa.) 344; Other *v.* Iveson, 3 Drewry, 177; Towne *v.* Ammidown, 20 Pick. 535; *Contra*, Smith *v.* Martin, 4 Des. Eq. (So. Car.) 148.

[2] Wood v. Fisk, 63 New York, 245.

[3] United States *v.* Archer's Exr. 1 Wallace, Jr. 173; disapproving, United States *v.* Cushman, 2 Sumner, 426.

stricti juris, and if his contract is not binding at law, there is no liability in equity founded on the consideration between the principal parties. A court of equity will not enforce a liability upon a surety where he is not held at law."[1]

§ 118. **When equity will charge surety who is not liable at law.**—Equity will, however, in many instances, afford relief against a surety where there is no remedy at law. Thus, equity will set up a lost bond against a surety. "The reason is, that the surety is not discharged by the loss of the bond, and the court only relieves against the accident by setting up the evidence of the debt."[2] Equity will reform a joint guardian's bond so as to hold it joint and several, where it appears clearly to have been the intention of the parties to give a joint and several bond, and relief will, in such case, be granted against the estate of a deceased surety. The court said: "When the contract does not express the agreement or intention of the parties to the injury of the obligee, and this is clearly made to appear, equity will reform the instrument, as well against sureties as principals."[3] Where, by mistake, property mortgaged by a surety is misdescribed, equity will reform the mortgage. In this case, the court said: "Where the surety is aware of, and consents to the purpose to which his obligation is to be applied, and it is so used, though without consideration, except that advanced to the principal, equity will reform any mistake of fact, so that the obligation shall fulfill its purpose."[4] Where principal and sureties signed a prison-bounds bond, and which, by mistake, misrecited the judgment on which the principal was imprisoned, it was held that equity would reform the bond.[5] Where principal and surety signed a joint bond by mistake, the intention being to sign a joint and several bond, and the principal died, it was held the surety could, by bill in equity, compel the payment of the bond by the estate of the principal as a specialty debt.[6] A agrees to be bound in a bond as surety to

[1] Leffingwell *v.* Freyer, 21 Wis. 398, per Dixon, C. J.; to similar effect, see Ratcliffe *v.* Graves, 1 Vernon, 196.

[2] Kerney's Admr. *v.* Kerney's Heirs, 6 Leigh. (Va.) 478, per Carr, J.; to same effect, see East India Company *v.* Boddam, 9 Vesey, 464.

[3] Olmsted *v.* Olmsted, 38 Ct. 309, per Butler, C. J. For case holding bond joint and several, and estate of surety chargeable, see Besore *v.* Potter, 12 Serg. and Rawle. (Pa.) 154.

[4] Prior *v.* Willaims, 3 Abb. Rep. Om. Cas. 624, per Peckham, J.

[5] Smith *v.* Allen, Saxton (N. J.) 43.

[6] Pride *v.* Boyce, Rice Eq. (So. Car.) 275.

B, and signs and seals it accordingly, but by the neglect of the clerk A's name is not inserted. The obligee shows A the condition, and his name and seal, and demands payment, and threatens to sue him unless he gives fresh security, which A agrees to do, but, after finding the mistake, refused, not being bound at law, yet equity will compel him.[1] In cases such as the preceding, equity affords relief on the ground of accident or mistake; but where it is sought to reform an instrument against a surety on the ground of mistake, evidence of the necessary facts must be so clear as to leave no doubt. It has been said that "although an instrument may undoubtedly be reformed on parol proof, yet where, as here, the relief sought is adverse to the pre-existent equity of a surety, the evidence should be so clear as to leave the fact without a shadow of a doubt."[2] A devise to executors with authority to sell the real estate of the testator for the payment of his debts, applies as well to a joint and several bond, executed by him as surety for his co-obligor, as to any other debts, and a court of chancery will compel a sale of the real estate, so as to pay such bond.[3] A law concerning the sale of school lands, prescribed the form of the notes to be given for the purchase of such lands, made them joint and several obligations, and specially declared that the surety should, in all respects, be liable as principal. A principal and surety signed a joint note for the purchase of such lands, and the surety died. Held, the estate of the surety was chargeable in equity for the amount of the note; the decision being placed on the ground alone that the statute made the surety liable as principal, and, being a public law, must be presumed to have been known to all the parties.[4] A trustee having in his hands funds arising out of property sold under a decree of court, became delinquent, and having wasted the fund, died intestate, having before committed breaches of his bond, for which both he and his sureties would have been liable at law if he had lived. A claimant of the fund in the hands of the trustee could not place himself in a position to proceed at law on the bond, because of the death of the trustee. Held, equity would afford him relief on the bond against the sureties. There was a clear

[1] Crosby v. Middleton, Finch's Precedents, 303.

[2] Moser v. Libenguth, 2 Rawle. (Pa.) 428, per Gibson, C. J.; Smith v. Allen, Saxton (N. J.) 43.

[3] Berg v. Radcliff, 6 Johns. Ch. 302.

[4] Powell v. Kettle, 1 Gillman (Ill.) 491.

right against the sureties, which could not be enforced at law because of the accident of the death of the principal, and the fact that there was a right, and no remedy at law, was sufficient alone to give equity jurisdiction. The law on this subject was well and concisely stated by the court, as follows: "A court of equity will do nothing to extend the liability of securities beyond the clear intent and import of their contract. But if to such an extent they cannot at law be held liable by reason of fraud, accident or mistake, a court of equity, to prevent a failure of justice, will interfere and enforce the execution of their contract, according to its obvious meaning and design."[1]

§ 119. **When new promise revives liability of surety or guarantor.**—If facts exist which are sufficient to discharge a surety or guarantor, and he, with full knowledge of the existence and effect of such facts, promises to pay the debt, the weight of authority is that he will be bound.[2] Where time had been given which would have discharged the surety on a note, and he, knowing this, paid part of the note, and promised to pay the balance, it was held, he had waived any defense he might have had by reason of such giving of time.[3] Where the holder of a note had been guilty of such laches as would have discharged the guarantor, but the guarantor, on demand of the holder, paid him the interest due on the note, knowing and protesting he was not liable on his guaranty, it was held he had waived the laches, and continued liable on the guaranty; and this, notwithstanding the fact that he paid the interest, because of the threat of the holder, that, unless he paid the interest he would sue him for other large debts which he owed the holder.[4] But the surety or guarantor will not be bound by such new promise, unless he made the same with a full knowledge of the facts, which would entitle him to a discharge,[5] and of their legal effect.[6] After time has been given by the creditor, which would discharge the surety on a note, his liability is not revived by a payment made on the note by him with money of principal, although at the time of such payment, he gave no intimation that the money was not his own.[7] It has been held

[1] Brooks *v.* Brooke, 12 Gill & Johns. (Md.) 306, per Dorsey, J.

[2] Ashford *v.* Robinson, 8 Ired. Law (Nor. Car.) 114.

[3] Hinds *v.* Ingham, 31 Ill. 400.

[4] Sigourney *v.* Wetherell, 6 Met. (Mass.) 553.

[5] Gamage *v.* Hutchins, 23 Me. 565.

[6] Robinson *v.* Offutt, 7 T. B. Monroe (Ky.) 540; *contra* Rindskopf *v.* Doman, 28 Ohio St. 516.

[7] Lime Rock Bank *v.* Mallett, 42 Me. 349.

that after the guarantor of a note is discharged by the laches of the holder, a new promise on his part will not bind him, unless there is also a new consideration.[1] Where the sureties on an official bond were, in fact, not liable for the default of their principal, and without seeing the bond acknowledged they were liable and promised to pay the defalcation, but afterwards, upon inspection of the bond, were advised they were not liable, and then refused to pay, it was held that as they promised under a mistake of law, they were not liable.[2]

§120. **Statute of limitations—When new promise or partial payment by principal takes case out of statute as to surety.**—If a principal and surety execute a joint, or joint and several note, bond, or other obligation, a new promise, or a partial payment by the principal, will avoid the bar of the statute of limitations as to the surety as well as to the principal.[3] This is placed upon the ground that as they are jointly liable, the admission or act of one is the admission or act of both. A written acknowledgment of the debt by the principal within the period prescribed by the statute of limitations, will not take the case out of the statute against a guarantor for the price of goods sold the principal, because in such case the principal and guarantor are not joint debtors.[4] If a claim against a deceased surety, as surety, is not presented till his estate is settled, it is barred the same as any other claim, and it makes no difference that the claim had been proved against the estate of the principal, and it could not be known till that estate was settled, how much of the claim it would pay.[5] Where a surety is about to be sued, and before the statute of limitations has barred the debt, he hands to the creditor for suit, a note which had been executed to him by the principal as an indemnity, it is such an admission of indebtedness on his part as will start the statute to running from that time, as to him.[6] It has been held that the sureties in a judgment at law,

[1] Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547.

[2] Welch *v.* Seymour, 28 Ct. 387.

[3] Hunt *v.* Bridgham, 2 Pick. 581; Perham *v.* Raynall, 9 Moore, 566; Craig *v.* Calloway County Court, 12 Mo. 94; Frye *v.* Barker, 4 Pick. 382; Joslyn *v.* Smith, 13 Vt. 353; Pease *v.* Hirst, 10 Barn. & Cress. 122; Clark *v.* Sigourney, 17 Ct. 511; Whitaker *v.* Rice, 9 Minn. 13; Caldwell *v.* Sigourney, 19 Ct. 37; Perkins *v.* Barstow, 6 Rhode Is. 505; Zents' Exrs. *v.* Heart, 8 Pa. St. 337; *contra,* Coleman *v.* Forbes, 22 Pa. St. 156.

[4] Meade *v.* McDowell, 5 Binney (Pa.) 195.

[5] Ratcliff *v.* Leunig, 30 Ind. 289.

[6] Russell *v.* La Roque, 11 Ala. 352.

which has been enjoined by the unconscionable litigation of the principal, until it has become barred by the statute of limitations, are in privity with the principal, and bound to all the legal consequences of his acts, and will not, therefore, be allowed to avail themselves of the advantage of the statute thus obtained, and they will be enjoined in equity from setting it up at law.[1] The statute of limitations commences running in favor of a surety or guarantor from the time he is liable to suit, and this, as already seen, may or may not be the same time the principal becomes so liable.[2]

[1] Davis *v.* Hoopes, 33 Miss. 173.

[2] On this subject, see the Governor *v.* Stonum, 11 Ala. 679; Bank *v.* Knotts, 10 Richardson Law (So Car.) 543; Sollee *v.* Meugy, 1 Bailey Law (So. Car.) 620.

CHAPTER IV.

OF THE LIABILITY OF THE SURETY WHEN THE PRINCIPAL IS DISCHARGED, OR NOT ORIGINALLY BOUND.

§ 121. **When surety not liable if principal not bound—General Principles.**—The obligation of a surety or guarantor is usually accessory to that of the principal, and as a general rule, wherever there is no principal there can be no surety; and whatever discharges the principal releases the surety. This is not, however, universally true. With reference to this, it has been well said that "A surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which are inherent to the debt; not those which are personal to the debtor. Pothier distinguishes them into exceptions *in personam* and exceptions *in rem*. The latter, which go to the contract itself, such as fraud, violence, or whatever entirely avoids the obligation, may be pleaded by the surety; but the former, which are grounded on the insolvency or partial solvency of the debtor, or which result from a cession of his property, or are the consequence of his minority, cannot be opposed to the creditor."[1] Where a statute prohibited the making of a particular kind of

[1] Baldwin *v.* Gordon, 12 Martin (La.) O. S. 378, per Porter, J. See, also, State *v.* Bugg, 6 Robinson (La.) 63; Jarratt *v.* Martin, 70 Nor. Car. 459.

note by a bank, it was held that such a note was void, and a guaranty of the note was likewise void.[1] Where property of the principal sufficient to satisfy the debt was levied on, it was held that such levy satisfied the debt as to the principal, and consequently as to the surety. The court said: "It would be as difficult for me to conceive of a surety's liability continuing after the principal obligation was discharged, as of a shadow remaining after the substance was removed."[2] A justice of the peace required two parties who were before him for examination, to enter into a joint recognizance with surety, when he had no right to require a joint obligation from both, but only had power to require a several recognizance from each. Such a joint recognizance was given, and it was held that it was void as to the principals, and consequently as to the surety. The court said: "It is a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal, there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal."[3] But a guaranty of a note, described therein by the name of its maker, its date, amount, and day of payment, and which is shown to the guarantor, and a commission paid to him at the time of signing the guaranty, binds him to pay the note upon non-payment thereof by the maker, after the usual demand and notice, although the note is made payable to the maker's own order, and never indorsed by him, and the want of such indorsement is not known to either party till after the day of payment. He had agreed to guaranty that particular instrument, and was bound by his obligation.[4] It was agreed between the agent of a railroad company and the plaintiff, that no appeal should be taken from an award to be made in a pending arbitration between the company and the plaintiff, but both parties should abide the award. Thereupon, the president of the company, together with

[1] Swift v. Beers, 3 Denio, 70.

[2] Farmers' & Mechanics' Bank v. Kingsley, 2 Douglass (Mich.) 379. See, also, Stull v. Davison, 12 Bush (Ky.) 167; Evans v. Raper, 74 Nor. Car. 639.

[3] Ferry v. Burchard, 21 Ct. 597, per Storrs, J. Holding, that because bond is void as to principal because of duress, it is not void as to surety, who was under no duress; see Jones v. Turner, 5 Littell (Ky.) 147.

[4] Jones v. Thayer, 12 Gray, 443.

the agent, personally guarantied to the plaintiff the performance by the company of said agreement. Held, the guarantors were liable in case of a breach of the agreement, even if the latter was not binding on the company, and the guarantors were estopped from denying the existence of the company.[1]

§ 122. **Discharge of principal generally releases surety.**—As a general rule, if the principal is released by the creditor, without reservation, the surety is also thereby discharged. Thus, a joint judgment was obtained against the principals and sureties on a note. The creditor agreed with one of the principals to discharge him from the judgment if he would give security for the payment of about one-fourth of the amount thereof, and the security was accordingly given. Held, the sureties were thereby discharged. The Court said that if in such a case the surety was held liable, "he could not recover over against the principal, because he is discharged from the debt, and owes the creditor nothing, and the surety could not recover for money paid to the use of the principal, as he owes nothing; and when the surety makes the payment, it cannot be for the use of the principal debtor."[2] A creditor agreed to accept from the principal 5*s*. in the pound in full of his demand, upon having a collateral security for that sum from a third person. He was induced to agree to this by the representation of the agent of the principal, that a surety would continue liable for the residue of the debt. Held, the surety was discharged. The representations being as to the legal effect of the instrument, were immaterial, and did not avoid it.[3] A was indebted to B and others, and C was surety for the debt due B. Afterwards A became bankrupt, and all his creditors signed a composition deed, agreeing to accept 7*s*. in the pound, in full payment of their claims, in drafts accepted by C as surety. B added before his name to the composition deed the words, "Without prejudice to any additional security we may hold." Held, notwithstanding the reservation, B could not enforce C's original liability. If all the creditors had held securities from C for the full amount due them, then such a reservation would have made the composition nugatory. Moreover, to allow B. to enforce this liability, might operate to the prejudice of the other creditors.[4]

[1] Mason *v.* Nichols, 22 Wis. 376.

[2] Trotter *v.* Strong, 63 Ill. 272; Brown *v.* Ayer, 24 Ga. 288.

[3] Lewis *v.* Jones, 4 Barn. & Cress. 506.

[4] Grundy *v.* Meighan, 7 Irish Law Rep. 519.

§ 123. **Surety not discharged by release of principal, when remedies against surety reserved, when he is fully indemnified, etc.**—If the creditor, at the time he releases the principal, reserves his remedies against the surety, such release amounts to a covenant not to sue only, and does not discharge the surety.[1] This has been held where the creditor by mistake executed an absolute release to the principal, but the agreement verbally was that the creditor's rights against the surety should be reserved.[2] By a mortgage deed the debtor covenanted to pay the principal and interest of a debt, and a surety covenanted to pay the interest. The principal afterwards by deed assigned his property to a trustee, on trust, to sell and divide the proceeds among his creditors. The creditors released the debtor from the debts due them, respectively, but there was a proviso in the deed of release, that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the principal. Held, the surety was not discharged. The court said: "The release cannot be construed to be absolute, because then no rights could be reserved in any case, and the courts have therefore held that such a release is not to be construed as absolute, but only as a covenant not to sue. That being so, the remedy is gone as between the debtor and creditor, inasmuch as the creditor cannot sue the debtor, but as against all other persons the rights of the creditor are reserved."[3] Judgment was recovered against a surety, and a separate judgment was recovered against the principal, which included also other claims. The creditor afterwards offered to give the control of the judgment against the principal to the surety, but the surety refused it. Afterwards the creditor agreed with the principal that he never would enforce the judgment against him, and assigned the judgment against the principal to a third person for the principal's benefit, but he reserved the right to proceed on the judgment against the surety. Held, the surety was not

[1] Bateson *v.* Gosling, Law Rep. 7 Com. Pl. 9; Hall *v.* Thompson, 9 Up. Can. C. P. R. 257; see, also, Wood *v.* Brett, 9 Grant's Ch. R. 452; Bell *v.* Manning, 11 Grant's Ch. R. 142; Union Bank *v.* Beech, 3 Hurl. & Colt, 672; to contrary effect, see Webb *v.* Hewitt, 3 Kay & Johns. 438.

[2] Bank of Montreal *v.* McFaul, 17 Grant's Ch. R. 234.

[3] Green *v.* Wynn, Law Rep. 4 Ch. Appl. Cas. 204, per Lord Hatherly, C.; affirming, Green *v.* Wynn, Law Rep. 7 Eq. Cas. 28.

discharged.[1] A, B and C executed a joint and several bond, as guardians, with T as surety. The ward, after coming of age, executed a release to A, adding: "But this release is not to apply to or affect my claims against B, my active guardian, and whose account remains unsettled." Held, in equity, that the release as to A was good, and that it was also a good defense to T, so far as he was surety for A, but that T remained bound for B and C.[2] If, before the release of the principal, the surety has paid a part of the debt, and secured the remainder, such release will not discharge such surety.[3] A surety who is fully indemnified is not discharged by the release of the principal. In such case the surety himself occupies the position of a principal.[4]

§ 124. **Miscellaneous cases on discharge of surety when principal is not bound, etc.**—Certain parties professing to be the representatives of a school district, made a note with sureties, and raised money on it to build a school house. The district had no power to borrow money for such a purpose, and it was held that it was not liable on the note, but that the sureties were liable thereon.[5] It has been held that the discharge of one of two joint guardians by the Orphan's Court, does not discharge the surety on their official bond. This was put on the ground that the court had the power to do this when the surety became bound, and he must be presumed to have consented that it might be done.[6] A surety concurs with the principal in suggesting to the creditor, who is pressing for his money, to accept a transfer of a mortgage, which the principal knows to be fictitious, but the surety believes to be genuine. The creditor, believing the mortgage to be genuine, accepted it, released the surety, and erased his name from the securities. Upon the faith of this release, the friends of the surety advanced him money for the purpose of relieving him from all other liabilities. Upon discovery of the fraud, it was held that the creditor was entitled to be restored to all his rights against the surety, in the same manner as if he had never been released, nor his name erased from the securities.[7]

[1] Hubbell *v.* Carpenter, 5 New York, 171.

[2] Kirby *v.* Turner, 6 John's Ch. R. 242; Kirby *v.* Taylor, Hopkins' Ch. R. 309.

[3] Hall *v.* Hutchons, 3 Mylne & Keen, 426.

[4] Moore *v.* Paine, 12 Wend. 123.

[5] Weare *v.* Sawyer, 44 New Hamp. 198.

[6] Hocker *v.* Woods' Exr. 33 Pa. St. 466.

[7] Scholefield *v.* Templer, 4 DeGex & Jones, 429; affirming, Schole-

The period of limitation to actions on bonds was fifteen years, and against officers, for breaches of official duty, one year. Suit was brought on the official bond of an auditor against his sureties, for dereliction of duty on the part of the auditor more than a year after he went out of office. Held, the statute was a bar in favor of the sureties.[1] If the creditor sues the principal and takes judgment for less than the amount due, and such judgment is satisfied, he cannot maintain a suit against the surety for the remainder of the debt.[2] A testator appointed, as his executors, two persons who were indebted to him on a bond—one as principal, the other as surety. Held, the bond was discharged by the appointment of the principal as executor, and thereby became *functus officio* as to the surety.[3]

§ 125. **When discharge of principal, after judgment against surety, releases surety.**—If the principal is discharged because of matters inherent in the transaction, even after judgment against the surety, the latter will be exonerated thereby. Thus, a sheriff and his sureties were sued on his official bond for his non-feasance, and severed in their defenses. Judgment was rendered against the sureties on demurrer, and the next day the issue was tried against the sheriff and he was found not guilty. Held, the sureties might therefore maintain a bill to perpetually enjoin the judgment against them. The court said the rights of the surety were the same after as before judgment. When the liability of the principal ceases, that of the surety should cease also. This principle was controlling even though the sureties knew all the facts before the judgment against them, except the discharge of the principal. That was a fact which occurred after the judgment, and was the fact which discharged them.[4] In a suit

field v. Templer, Johns. (Eng. Ch.) 155.

[1] State v. Blake, 2 Ohio St. 147.

[2] Couch v. Waring, 9 Ct. 261.

[3] Eichelberger v. Morris, 6 Watts (Pa.) 42. Where an instrument guarantied certain notes, the amount of which was carried out and footed up, it was held the guarantor was liable for the full amount, although the principal was entitled to a reduction as against the creditor, James v. Long, 68 Nor. Car. 218. Holding that the accommodation drawer of a note is not released by the release of the payee, where the holder did not know of the suretyship, see Carstairs v. Rolleston, 1 Marshall, 207. Holding that the accommodation acceptor of a bill of exchange is not discharged if the holder, who did not know of the suretyship when he took the draft, after learning that fact, releases the drawer, See Howard Banking Company v. Welchman, 6 Bosw. (N. Y.) 280.

[4] Ames v. Maclay, 14 Iowa, 281.

against a sheriff and the sureties on his official bond, judgment was recovered against all of them. The sheriff alone appealed, and on a final trial was acquitted. Held, the judgment against the sureties could not afterwards be enforced.[1] G sold B and W, negroes introduced into the State, in violation of law. B and W executed a note in part payment for the slaves, which M indorsed. G sued B and W at law, on the note, and they set up the illegality of the consideration thereof and were discharged. G at the same time sued M, the indorser, who being ignorant of the facts concerning the consideration, made no defense, and judgment was had against him. Held, M could sustain a bill for perpetual injunction as to the judgment against him, on the ground that his principal had been discharged, and this although he might have ascertained the facts, as to the consideration, by inquiry.[2] A bought slaves and gave his notes with B, as surety for the price. Having cause to rescind the sale, A brought suit to procure a rescission thereof. Pending such suit, the vendor brought suit against A and B on the note, and recovered judgment against B by default. A afterwards, in his rescission suit obtained a decree canceling the notes. Held, the effect of that decree was to discharge B.[3] The principal in a bond for the payment of money, was sued alone for a breach thereof, and upon pleas of payment and accord and satisfaction, there was a verdict and judgment in his favor. Held, this was not a defense to a surety who was afterwards sued on the same bond. The court said the judgment would not have been conclusive against the surety, if it had been against the principal, and should not be conclusive in his favor, when in favor of the principal.[4] The fact that the discharge of the principal, should in such case of itself release the surety, seems to have been overlooked.

§ 126. **Surety not discharged if principal released by act of law.**—The discharge of the principal by the act of the law, in which the creditor does not participate, will not release the surety. A familiar illustration of this rule is that of the discharge of the principal in bankruptcy or under insolvent laws, in which case the surety is generally held not to be discharged

[1] Beall v. Cochran, 18 Ga. 38.

[2] Miller v. Gaskins, 1 Smedes & Mar. Ch. R. (Miss.) 524.

[3] Dickason v. Bell, 13 La. An. 249.

[4] State Bank v. Robinson, 13 Ark. (8 Eng.) 214.

thereby.[1] A creditor pending an action against a surety who contested his liability, proved the debt under a commission of bankruptcy against the principal, and by his signature enabled the bankrupt to obtain his certificate, though the surety had given him notice not to sign it. Held, the surety was not discharged.[2] A state statute provided that "The obligation of the surety is accessory to that of his principal, and if the latter from any cause becomes extinct, the former ceases, of course." A principal having been discharged in bankruptcy, it was held that the statute was only an affirmation of the common law, and the words "from any cause" meant any cause dependent on the act or negligence of the creditor, and that the surety was not discharged. The court said: "The discharge of the principal, which discharges a surety, must be a discharge by some act or neglect of the creditor, and a discharge by operation of law being as it is against the consent and beyond the power of the creditor, does not discharge the surety."[3] Judgment having been recovered against a debtor, he gave bond with surety that the judgment should be paid within nine months. The debtor was afterwards arrested by virtue of the judgment, and discharged under the insolvent law. Held, the surety was not thereby released. The court said: "That the arrest on *a capias ad satisfaciendum* is in itself a satisfaction of the debt, is a position not to be maintained unless the plaintiff consented to the discharge; then, indeed, the debt is gone. * Here the plaintiff gave no consent to the discharge of * (the principal). It was effected by act of law, which, like the act of God, injures no man."[4]

§ 127. **Whether surety bound when principal does not sign the obligation.**—As to whether the surety is bound when the principal, who is named in the instrument, does not sign it, there is great conflict of authority. It has been held that in such case the surety is not liable, and in holding this with reference to the bail bond in a civil suit, the court said: "Now we think it essen-

[1] Alsop *v.* Price, 1 Douglas (Eng.) 160; Garnett *v.* Roper, 10 Ala. 842; Cowper *v.* Smith, 4 Mees. & Wels. 519; Kane *v.* Ingraham, 2 Johns. Cas. 403; Seaman *v.* Drake, 1 Caines, Rep. 9; Inglis *v.* Macdougal, 1 Moore, 196; Claflin *v.* Cogan, 48 New Hamp. 411; Moore *v.* Wallers' Heirs, 1 A. K. Marsh (Ky.) 488; Jones *v.* Hagler, 6 Jones, Law (Nor. Car.) 542; but see Jones *v.* Knox, 46 Ala. 53.

[2] Browne *v.* Carr, 2 Russell, 600.

[3] Phillips *v.* Solomon, 42 Ga. 192, per McKay, J.

[4] Sharpe *v.* Speckenagle, 3 Serg. & Rawle (Pa.) 463, per Tilghman, C. J.

tial to a bail bond, that the party arrested should be principal. It is recited that he is, and the instrument is incomplete and void without his signature. The remedy of the sureties against the principal would wholly fail, or be much embarrassed if such an instrument as this should be held binding. Suppose they wish to arrest the principal in some distant place, or in some other state, what evidence would they carry with them that they were his bail? There is nothing to estop him from denying the fact, nor any proof that it was true."[1] Where in the body of a county treasurer's official bond, his name was recited, but he neither signed nor sealed it, the sureties who signed it were held liable. The court said the treasurer was liable to the county without any bond, and also liable to his sureties for any amount paid by them, even though he did not sign the bond. They might not be able to produce the bond as evidence, but this was no greater inconvenience than if the bond had been lost. The words of the statute which provided for giving bond with surety, might well be construed to mean giving bond by surety.[2] One who has by an instrument indorsed on a lease, guarantied the fulfillment of the covenants of the lease by the lessees, naming them, is bound by his guaranty, although the lease is executed by only one of the lessees, where it appears that both lessees occupied the demised premises, and had possession of all the property mentioned in the lease for the whole term.[3] It has been held that a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, and executed in the name of the firm by only one of two partners named as principals therein, cannot be enforced against the surety without evidence of the assent of the

[1] Bean v. Parker, 17 Mass. 591, per Parker, C. J. To same effect, with reference to surety on prison-bounds bond, Curtis v. Moss, 2 Robinson, (La.) 367; with reference to surety on bond of a county treasurer, People v. Hartley, 21 Cal. 585; and with reference to the surety on an administrator's bond, Wood v. Washburn, 2 Pick. 24. *Contra*, Parker v. Bradley, 2 Hill (N. Y.) 584; Miller v. Tunis, 10 Up. Can. C. P. R. 423.

[2] State v. Bowman, 10 Ohio, 445. To same effect, where a bond was conditioned that the principal should pay for such goods as he should purchase, see Williams v. Marshall, 42 Barb. (N. Y.) 524. Where a bond provided for the payment by each of several sureties, of $1,000, it was held that the bond showed an obligation on behalf of each surety to pay the sum of $1,000, and on behalf of the principal to pay the aggregate of all the sums. People v. Breyfogle, 17 Cal. 504.

[3] McLaughlin v. McGovern, 34 Barb. (N. Y.) 208.

other partner to its execution.[1] But where one member of a firm signed the firm name to a note under seal, which consequently did not bind the other member, it was held that a surety on the note was not, for that reason, discharged.[2] Where a surety signed a bond which purported to have been signed by the principal, but had not in fact been signed by him nor by his authority, it was held the surety was not discharged, unless he delivered the bond as an escrow.[3] Principal and surety entered into a recognizance for the appearance of the principal at the March term of the court, to answer an indictment. The principal did not appear, and the surety alone, at the March term, entered into a recognizance for the appearance of the principal at the May term. No default was entered on the first recognizance. The principal did not appear at the May term: Held, the surety was liable on the last recognizance. He would not have been liable but for the previous recognizance; because, otherwise, the surety might control the person of the principal without his consent. But in this case, the principal, having entered into the first recognizance, could not make this objection, and the surety could not complain because, by entering into the last recognizance, he saved a forfeiture of the first.[4]

§ 128. **When surety bound for contract of infant or married woman, which is not binding on them.**—Where a party becomes the surety of a married woman, an infant, or other person incapable of contracting, he is bound, although the principal is not. With reference to this, it has been said that: "Fraud, illegality, or mistake, which may rescind the contract of the principal, induces the discharge of the sureties; but if the invalidity of the contract rests upon reasons personal to the principal, in the nature of a privilege or protection, the principal acquires a personal defense against the contract," but the contract subsists, and the sureties may be charged thereon. The disability of the principal may be the very reason why the surety was required.[5] An infant

[1] Russell v. Annable, 109 Mass. 72.

[2] Stewart v. Behm, 2 Watts (Pa.) 356.

[3] Loew v. Stocker, 68 Pa. St. 226. To similar effect, with reference to a promissory note, see Chase v. Hathorn, 61 Me. 505.

[4] Combs v. The People, 39 Ill. 183. Holding that several persons who execute a bond, may show by parol that they are all sureties for a person who did not sign the bond, see Artcher v. Douglass, 5 Denio, 509.

[5] Smyley v. Head, 2 Richardson Law (So. Car.) 590, per Frost J. St. Albans Bank v. Dillon, 30 Vt. 122; Kimball v.

bought a tract of land and gave his note with sureties for the purchase money. On coming of age he disaffirmed the sale. Held, the sureties were discharged thereby. The court said: "As a general proposition, it is undoubtedly correct that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertaking. But the cases in which this principle has been decided, are clearly distinguishable from the present one. Here the undertaking of the sureties goes to the whole consideration. * By the disaffirmance of the contract the plaintiff gets back his land, and the consideration which upheld the contract is extinguished. It would be a strange doctrine which would give him back his land and allow him to recover from the sureties the purchase money also."[1]

§ 129. **Discharge of surety does not release principal.**—If the creditor release the surety, he does not thereby discharge the principal. The reason why the discharge of one joint debtor discharges all, is that the responsibility of the one not released is thereby increased. This reason does not apply to the case of the discharge of the surety, for the surety is not liable to the principal, but the principal is bound to indemnify the surety. The discharge of the surety is nothing beyond what the principal himself was bound to effect, and therefore no injustice is done him.[2]

Newell, 7 Hill, 116; Nabb *v.* Koontz, 17 Md. 283; Davis *v.* Statts, 43 Ind. 103; Weed Sewing Machine Co. *v.* Maxwell, 63 Mo. 486; Yale *v.* Wheelock, 109 Mass. 502; Jones *v.* Crosthwaite, 17 Iowa, 393.

[1] Baker *v.* Kennett, 54 Mo. 82 per Wagner, J. Patterson *v.* Cave, 61 Mo. 439. See, also, on this subject, Kuns' Exr. *v.* Young, 34 Pa. St. 60.

[2] Mortland *v.* Himes, 8 Pa. St. 265; Bridges *v.* Phillips, 17 Texas, 128; Burson *v.* Kincaid, 3 Pen. & Watts, (Pa.) 57.

CHAPTER V.

OF CONTINUING GUARANTIES.

§ 130. **When guaranty ambiguous it may be explained by parol—No general rule for determining whether guaranty continuing or not.**—A question often arising upon guaranties, is, whether the guaranty is confined to a single credit or transaction, or whether it is continuing, and covers several credits or transactions. As already shown, the true rule for construing guaranties is to give effect to the intention of the parties, as expressed in the instrument, read in the light of the surrounding circumstances. Numerous instances of the views on this subject, entertained by the courts, will be found upon an examination of the cases cited in this chapter. When the words of a guaranty will equally well bear the construction that it is or is not continuing, an ambiguity arises which may be explained by parol evidence of the situation and surroundings of the parties, and the construction which they have put upon it.[1] This subject is well illustrated by the following remarks of a learned judge, made in deciding whether a guaranty was continuing or not: "It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject matter which the parties had in their contemplation when the guaranty was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about; not for the purpose of altering the terms of the guar-

[1] Hotchkiss *v.* Barnes, 34 Ct. 27.

anty by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guaranty. Having done that, it will be proper to turn to the language of the guaranty, to see if that language is capable of being construed so as to carry into effect that which appears to have been really the intention of both parties."[1] Where a guaranty is, from its terms, clearly not a continuing one, but is limited to one transaction, parol evidence of the previous dealings or of the dealings contemplated between the creditor and the principal, or that the guarantor had previously agreed to give the plaintiff a guaranty for future advances, and that the goods were sold relying on such guaranty, or that the relations of the principal parties were well known to the guarantor, is not admissible to show the guaranty to be a continuing one, for that would be to contradict the instrument, and not explain an ambiguity.[2] As the terms of guaranties, and the circumstances under which they are given, differ in almost every case, no definite rules for determining whether a guaranty shall be considered a continuing one or not, can be given. The only way to illustrate the subject is to refer to facts of decided cases, and this course will be pursued.

§ 131. **Continuing guaranties—Instances.**—A guaranty was as follows: "Mr. J. B. Maynard being about to commence the retailing of dry goods at Connelton, Indiana, and desiring to open a credit with the firm of James Lowe & Co., of the city of Louisville, I hereby undertake and contract with said Lowe & Co., to become responsible to them for the amount of any bill or bills of merchandise sold by them to said Maynard, agreeably to the terms of sale agreed upon between the parties, without requiring said Lowe & Co. to prosecute suit against said Maynard therefor." Held, to be a continuing guaranty and not confined to the first few bills bought by Maynard upon commencing business.[3] When the writing was: "In consideration of your supplying Mr. John McGuire supplies of, etc., out of your store for his business, we agree to become responsible for the payment of $200 for such goods, and guaranty the payment of that amount, whether the same be due on note or book account to

[1] Per Willes, J., in Heffield *v.* Meadows, Law Rep. 4 Com. Pl. 595.

[2] Boston & Sandwich Glass Co. *v.* Moore, 119 Mass. 435.

[3] Lowe *v.* Beckwith, 14 B. Monroe (Ky.) 150.

you for said" * it was held to be a continuing guaranty.[1] A writing was as follows: "To whom it may concern. The bearer, M. R., son of the subscriber, is about to establish a store in Portland, of books and stationery, and now goes on to Boston to obtain an assortment of stock for that purpose. He will commence on a limited scale, with the intention of enlarging the business next spring. He wishes to purchase school books, &c., upon a credit of four or six months, and miscellaneous books, paper, &c., on commission. For the faithful management of the business and punctual fulfillment of contracts relating to it, the subscriber will hold himself responsible." Held, a continuing guaranty for such purchases as the son might make.[2] The following was held to be a continuing guaranty: "In consideration of your agreeing to supply goods to K at two months' credit, I agree to guaranty his present or any future debt with you to the amount of 60*l.* Should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days of receiving notice from you."[3] The defendant's son being indebted to the plaintiffs for coals supplied on credit, and the plaintiffs refusing to continue to supply coals unless a guaranty was given them, the defendant gave this guaranty: "In consideration of the credit given by the H. G. C. Co. to my son for coal supplied by them to him, I hereby hold myself responsible as a guaranty to them for the sum of 100*l.*, and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing to an amount not exceeding the amount of 100*l.*" Held, a continuing guaranty. The court said: "The question in these cases depends not merely on the words; but when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction. * The words 'whatever may be owing,' * seem not suitable to a specific and ascertained sum already due, but have a direct and proper application to what might afterwards become due."[4] A letter contained the following: "I do recommend my friend, Mr. J. B. Scudder, of the parish of East Baton Rouge, a planter, and any funds that he may raise, or ac-

[1] Fennell *v.* McGuire, 21 Up. Can. C. P. R. 134.

[2] Mussey *v.* Rayner, 22 Pick. 223.

[3] Martin *v.* Wright, 6 Adol. & Ell. (N. S.) 917.

[4] Wood *v.* Priestner, Law Rep. 2 Exch. 66, per Kelly, C. B.; affirmed, Wood *v.* Priestner, Law Rep. 2 Exch. 282.

ceptances, in case he does not pay, I feel bound to pay." Held, a continuing guaranty, the guarantor and Scudder being both planters, and the circumstances showing that a continuing guaranty was intended.[1] This is a continuing guaranty: "I hold myself accountable to you for any goods Mr. Francis Murphy may purchase of you to the amount of 250*l.* currency."[2] Also the following: "Sir, you can let J. L. Day have what goods he calls for, and I will see that the same are settled for."[3]

§ 132. **Continuing guaranties—Instances.**—A bought from B certain hides, but before they were delivered, B having heard that A had transferred his property, refused to deliver the hides unless C would become responsible therefor. C, learning this, telegraphed to B: "We agree to be answerable for the skins," and afterwards wrote, vouching for A's honesty, and concluding: "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you, and when to the contrary we will write you." Held, the letter was a continuing guaranty, unlimited in amount. The court said: "It was calculated to induce the plaintiffs to give credit to a man to whom they would not otherwise have given it."[4] One Tully, being about to go into business, and desiring credit, a relative of his wrote to certain merchants as follows: "Please let Mr. P. Tully have the paints, oils, varnishes, glass, etc., he wants. I will be security for the amount for what he will owe you." Held, a continuing guaranty.[5] The material part of the guaranty was: "I will guaranty their engagements, should you think it necessary, for any transaction they may have with your house." Held, the guaranty was a continuing one, and in force till countermanded by the guarantor."[6] "I do hereby agree to guaranty the payment of goods to be delivered, in umbrellas and parasols to * according to the custom of their trading with you, in the sum of 200*l.*", is a continuing guaranty.[7] The following is a continuing

[1] Menard *v.* Scudder, 7 La. An. 385.

[2] Ross *v.* Burton, 4 Up. Can. Q. B. R. 357.

[3] Hotchkiss *v.* Barnes, 34 Ct. 27.

[4] Nothingham Hide Co. *v.* Bottrill, Law Rep. 8 Com. Pl. 694, per Keating, J.

[5] Boehne *v.* Murphy, 46 Mo. 57.

[6] Grant *v.* Ridsdale, 2 Harris & Johns. (Md.) 186.

[7] Hargreave *v.* Smee, 6 Bing. 244; *Id.* 3 Moore & Payne, 573.

guaranty: "I hereby agree to guaranty the payment to A for any goods which may be purchased of him by B, not, however, binding myself to become responsible for a larger sum than five hundred dollars, except by another special agreement, the above guaranty to remain in force until it is withdrawn by me."[1] The following is a continuing guaranty: "Whereas, W. C. is indebted to you, and may have occasion to make further purchases from you, as an inducement to you to continue your dealings with him, I undertake to guaranty you in the sum of 100*l.*, payable to you in default on the part of the said W. C., for two months."[2] A and B executed a bond to C in the penal sum of $1,500, conditioned "to pay or cause to be paid to C all sums or sum of moneys, responsibilities, debts and dues which B might owe C, equal to the sum of $1,500, either contracted or which might thereafter be contracted." Held, this was a continuing guaranty, and covered indebtedness of B to the extent of $1,500, although part of the debts contracted by B, under the guaranty, had been paid by him. Held, also, that notes of B made to a third party, and by such third party indorsed to C, were within the terms of the guaranty. The court said: "Such a debt is a debt due to * (C), as much as any other. This is the criterion the parties have chosen to adopt, and it is not for the court to restrict it."[3]

§ 133. **When guaranty not exhausted by the advance of the amount mentioned therein.**—A bond was conditioned to indemnify and save harmless the obligees for "such sums as they in their banking business should within ten years advance or pay, or be liable to advance or pay, for or on account of their accepting, discounting, etc., any bill of exchange, etc., which A B should from time to time draw upon or make payable, etc., at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, etc., on the credit of A B, or on his account, and also all such wages and allowances for advancing, paying, etc., such bills, etc., not exceeding 5,000*l.* in the whole, together with interest on such advances." Held, a continuing guaranty, and not exhausted by the first advance of 5,000*l.*[4] Where the instrument was as follows: "Sir, I hereby guaranty

[1] Melendy *v.* Capen, 120 Mass. 222.

[2] Allan *v.* Kenning, 9 Bing. 618 *Id.* 2 Moore & Scott, 768.

[3] Lewis *v.* Dwight, 10 Ct. 95, per Williams, J.

[4] Williams *v.* Rawlinson, Ryan & Moody, 233.

the payment of any amount of goods you may give to B, not exceeding 40*l.* sterling," it was held to be a continuing guaranty, the first part being unlimited, and the second part only limiting it as to amount.[1] A guaranty was as follows: "I agree to be responsible for the price of goods purchased of you, either by note or account, by H, at any time hereafter, to the amount of $1,000." Goods were sold on the credit of the guaranty to the amount of more than $1,000, which were paid for, and more goods were sold, when H became insolvent, owing more than $1,000 that had been sold on the credit of the guaranty. Held, the guaranty was continuing, and not exhausted by the first sales, amounting to $1,000, and that the guarantor was liable for $1,000. The court said: "When by the terms of the undertaking, by the recitals of the instrument, or by a reference to the custom and course of dealing between the parties, it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend."[2] The same thing was held, when the guaranty was: "I will be and am responsible for any amount for which * may draw on you, for any sum not exceeding $1,500, on condition of your acceptance of the same."[3] Also, when the material part of a guaranty was: "For any goods he hath or may supply W. P. with, to the amount of 100*l.*"[4] A guaranty to be "accountable that B will pay you for glass, paints, etc., which he may require in his business, to the extent of fifty dollars," is a continuing guaranty, and not exhausted by the first fifty dollars of credit given to B. "Had the guarantor desired or intended to limit his responsibility to a single transaction, or to several transactions not exceeding that sum in all, it was easy to have said it in plain and unmistakable terms; that if he has failed to do so, and by equivocal language induced the guarantee to part with the goods, he should be held to abide the consequences."[5] The same thing was held where the guaranty was: "I will be responsible for what stock * (A) has had, or may

[1] Whelan *v.* Keegan, 7 Irish Com. Law R. 544.

[2] Bent *v.* Hartshorn, 1 Met. (Mass.) 24, per Shaw, C. J.

[3] Crist *v.* Burlingame, 62 Barb. (N. Y.) 351.

[4] Mason *v.* Pritchard, 12 East, 227.

[5] Rindge *v.* Judson, 24 New York, 64, per James, J.

want hereafter, to the amount of five hundred dollars."[1] An obligation was as follows: "In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole 1,000*l.*, we hereby jointly and severally guaranty the payment of any such sum as may be owing to the bank at the expiration of said period of eighteen months." Held, under the circumstances (which should be considered) this was a continuing guaranty. The words, "not exceeding in the whole 1,000*l.*," * were intended to express the limit of the defendants' liability, and not to prohibit the bank from making any further advances to R. & Co."[2]

§ 134. **When guaranty exhausted and when not exhausted by the advance of the amount mentioned therein.**—A guaranty not under seal of "the sum of $500, to be drawn out in merchandise by W from time to time as he may want; this guaranty to remain good until further order, or until April 1st, 1857," is continuing, and renders the guarantor liable to the extent of $500 for goods sold within the prescribed period, even though more than that amount of goods have been sold on the credit of the guaranty and paid for by the principal within that time.[3] The same thing was held where the guaranty was as follows: "In consideration of your supplying my nephew, V, with china and earthenware, I guarantee the payment of any bills you may draw on him, on account thereof, to the amount of 200*l.*"[4] An obligation was as follows: "Our friend * (A) to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the said * (A) fail to do so." Held, a continuing guaranty and not exhausted by the first sale of $8,000 worth of goods.[5] The following has been held to be a continuing guaranty, and not exhausted by the first sales under it: "Gentlemen, my brother Roswell is wishing to go into business in New York, by retailing goods in a small way. Should you be disposed to furnish him with such goods as

[1] Gates *v.* McKee, 13 New York, 232.

[2] Lawrie *v.* Scholefield, Law Rep. 4 Com. Pl. 622, per Smith, J.

[3] Hatch *v.* Hobbs, 12 Gray, 447.

[4] Mayer *v.* Isaac, 6 Mees *v.* Wels, 605.

[5] Douglass *v.* Reynolds, 7 Peters, 113.

he may call for, from 300 to 500 dollars' worth, I will hold myself accountable for the payment, should he not pay, as you and he shall agree."[1] M wrote to L, thus: "Mr. B informs me that in conversation with Mr. S, of your firm, he stated to B, 'if he would get me to be responsible for him to you, or in other words, to give B a letter of credit to you, he would sell him on longer time, say nine months or a year.' This is therefore to inform you that I will be responsible for B to the amount of one thousand dollars." Held, to be a continuing guaranty until goods to the amount of one thousand dollars were purchased, but no longer.[2] Where a guaranty was "Mr. Lyman Wilson wishes to buy stock for his shop and pay in six months or before, we will be surety for him for a sum not to exceed one hundred dollars," it was held, that the plaintiffs were authorized to deliver stock to Wilson to the amount of one hundred dollars on the credit of the guaranty, and that it need not all be sold at once, but might be sold and delivered from time to time, within a reasonable period.[3]

§ 135. **What not continuing guaranty—Instances.**—Twenty-seven persons signed a guaranty, by which they agreed to be each bound for one hundred dollars for the purchasers "for any goods" they might buy of the sellers, the goods to be paid for at such time as might be agreed upon between the purchasers and sellers, "and each of us to be bound for one hundred dollars, and no more." Held, this was not a continuing guaranty, and only bound the guarantors for goods sold at any time or times, which in the whole amounted to twenty-seven hundred dollars.[4] Where a guaranty was: "I, * agree to become surety to * (A) for any bills contracted by * (B) from this date, said bills in the aggregate not to exceed $300," it was held not to be continuing, and that it was exhausted by the sale of the first $300 worth of goods.[5] A bond recited that Colburn (principal), having occasion for di-

[1] Rapelye *v.* Bailey, 5 Ct. 149.

[2] Lawton *v.* Maner, 10 Rich. Law (So. Car.) 323.

[3] Keith *v.* Dwinnell, 38 Vt. 286. For other examples of continuing guarantys, see Hitchcock *v.* Humfrey, 5 Man. & Gr. 559; *Id.* 6 Scott, N. R. 540; Farmers & Mechanics Bank *v.* Kerchival, 2 Mich. 504; Heffield *v.* Meadows, Law Rep. 4 Com. Pl. 595; Coles *v.* Pack. Law Rep. 5 Com. Pl. 65; Burgess *v.* Eve. Law Rep. 13 Eq. 450; Simpson *v.* Mauley, 2 Cro. & Jer. 12; Bastow *v.* Bennett, 3 Camp. 220; Merle *v.* Wells, 2 Camp. 413; Tanner *v.* Moore, 9 Queen's B. 1; Hoad *v.* Grace, 7 Hurl. & Nor. 494; Woolley *v.* Jennings, 5 Barn. & Cres. 165.

[4] Wilde *v.* Haycraft, 2 Duvall (Ky.) 309.

[5] Bussier *v.* Chew, 5 Phila. (Pa.) 70.

vers sums of money, not exceeding in the whole the sum of 3,000*l.*, had applied to the plaintiffs to advance the same at such times and in such parts and proportions as he might require. Held, this was not a continuing guaranty, but was exhausted by the first advances to the extent of 3,000*l.*[1] The following guaranty was held to be not continuing, and to cover only one transaction: "I guaranty the sum of five hundred dollars value in glass shades, purchased by my son A from B. Terms of purchase to be sixty days from date of invoice, and if not paid within ninety days, draft to be drawn on me for the amount."[2] The following obligation was held not to be a continuing guaranty: "I hereby agree to be answerable for the payment of 50*l.* for T. Lerigo, in case T. Lerigo does not pay for the gin, etc., which he receives from you, and I will pay the amount."[3] When a guaranty was: "I hereby agree to guaranty to you the payment of such an amount of goods, at a credit of one year, interest after six months, not exceeding $500, as you may credit to * (A)," it was held to be not continuing. The Court said: "Where by the terms of the guaranty it is evident the object is to give a standing credit to the principal, to be used from time to time, either indefinitely or until a certain period, there the liability is continuing; but where no time is fixed, and nothing in the instrument indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time, whether the amount is limited or not."[4] A guaranty was as follows: "I hereby agree to be answerable to K for the amount of five sacks of flour, to be delivered to T, payable in one month." Five sacks of flour were delivered to T, and a few days after five more were delivered. Shortly afterwards three and a half of the first five were returned. Held, the guarantor was only liable for one and a half sacks, as the guaranty was exhausted by the delivery of the first five sacks.[5]

§ 136. **What not continuing guaranty—Instances.**—A portion of a letter was as follows: "The object of the present letter is to request you, if convenient, to furnish them (principals) with any sum they may want, so far as fifty thousand dollars, say

[1] Kirby *v.* The Duke of Marlborough, 2 Maule & Sel. 18.

[2] Boston & Sandwich Glass Co. *v.* Moore, 119 Mass. 435.

[3] Nicholson *v.* Paget, 1 Cromp. & Mees, 48 *Id.* 3 Tyrwh. 164.

[4] Fellows *v.* Prentiss, 3 Denio, 512, per Hand, Senator.

[5] Kay *v.* Groves, 6 Bing. 276; *Id.* 3 Moore & Payne, 634.

fifty thousand dollars. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it, and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount." Held, this was not a continuing guaranty, but was exhausted by the advance of fifty thousand dollars.[1] The following was held not to be a continuing guaranty: "Sir, for any sum that my son, George Reed, may become indebted to you, not exceeding $200, I will hold myself accountable."[2] A sealed promise to pay, "whatever sum may be due for all articles of book account furnished to J at his request, and for his use and for which he is now indebted, and for all other articles of book account furnished on this day or at any future day, provided said articles of book account do not exceed the sum of two hundred and fifty dollars," applies only to the existing debt, and articles furnished in addition to make up the sum of $250, and when these are paid, does not continue to secure any future balance of account.[3] The material portion of a writing was: "We here offer ourselves in security to any gentleman who may feel disposed to give him (purchaser) credit, not exceeding seven hundred dollars, to be bound and held firmly by this writing to pay the said sum of seven hundred dollars, or any less sum." Held, this was not a continuing guaranty, and only authorized the giving of credit one time.[4] R, doing business as a retail dealer in furniture, obtained from C, a writing addressed to the plaintiff, who was a wholesale furniture dealer, as follows: "There is a fair prospect that R could sell a few chamber suits if he had them. If you let him have them, we will see that you receive pay for them as sold or soon thereafter." Held, the guaranty contemplated but a single sale of chamber suits only, accompanied or speedily followed by delivery.[5] A guaranty was in the following words: "Whereas, Joel Hall has agreed to indorse Samuel Cooper's notes at the Middletown Bank to the amount of 4,000 dollars, I hereby agree to be responsible to said Hall for one-half the amount of any loss he may sustain by said indorsement; and I agree to pay the one-half of any payments which

[1] Cremer v. Higginson, 1 Mason, 323.

[2] White v. Reed, 15 Ct. 457.

[3] Congdon v. Read, 7 Rhode Is. 406.

[4] Aldricks v. Higgins, 16 Serg. & Rawle, 212.

[5] Hayden v. Crane, 1 Lansing (N. Y.) 181.

said Hall may be obliged to pay in the same manner and at the same time, which I should be obliged to pay it provided I was joint indorser with him on said notes." Held, not a continuing guaranty, and that the party signing it, was only liable to contribute as to the first $4,000 of notes indorsed by Hall.[1] This guaranty was held not continuing: "Sir: * (A) wishing to alter his present mode of doing business and make arrangements in Charleston, has requested me to continue my assistance by lending him my name. I have therefore consented that he shall use it for the amount of from $1,000 to $1,500. He will in future carry on business on his own account, and make his own remittances."[2]

§ 137. **What not continuing guaranty—Instances.**—The fact that a guaranty did not limit the amount for which the guarantor might become liable, has sometimes had a controling influence, and induced, the court to hold it to be not continuing. Thus, a guaranty was: "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time." Held, it was confined to a single transaction. The court said: "We think it is limited to a single purchase or transaction. We must hold this or that it is unlimited, both as to time and amount. Every person is supposed to have some regard to his own interest, and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount, unless he has done so in express terms, or by clear implication."[3] The same thing was held where the guaranty was as follows: "We consider J. V. E. good for all he may want of you, and will indemnify the same." The court said: "Ordinarily, the instruments that have been held to be continuing guaranties, limited the amount of the credit, which greatly diminished the responsibility."[4] "Please let the bearer * (A) buy merchandise to the amount of two or three hundred dollars, on six months, and I will see that you have your pay," is not a continuing guaranty.[5] An instrument was as follows: "P * having informed me that he is making some purchases from you, and not being acquainted

[1] Hall v. Rand, 8 Ct. 560.

[2] Sollee v. Meugy, 1 Bailey Law (So. Car.) 620.

[3] Gard v. Stevens, 12 Mich. 292, per Manning, J.

[4] Whitney v. Groot, 24 Wend. 82, per Nelson, C. J.

[5] Reed v. Fish, 59 Me. 358.

with you, that you wish some reference. Though not personally acquainted, yet I would say from my knowledge of P * that you might credit him with perfect safety, and that anything he might purchase from you I would see paid for." Held, not a continuing guaranty, and that it was limited to the purchases then being made.[1] The defendants addressed to the plaintiffs the following letter: "Whatever goods you sell to A B to be sold in our store, we will consent that he may take the money out of our concern to pay for the same, etc. The said A B shall have the liberty of taking the pay out of our concern as fast as the goods are sold." Held, if this was a guaranty, it was not a continuing one. The court said: "If the plain terms of the contract may be fulfilled by being confined to one transaction, courts are not anxious to extend it to others."[2] A guaranty was as follows: "I engage to guaranty the payment of Mr. Amos Molden to the extent of 60*l.*, at quarterly account bill two months for goods, to be purchased by him of William and David Melville." Held, the guaranty only covered advances made during one quarter.[3]

[1] Anderson *v.* Blakely, 2 Watts. & Serg. (Pa.) 237.

[2] Baker *v.* Rand, 13 Barb. (N. Y.) 152, per Hand, J.

[3] Melville *v.* Hayden, 3 Barn. & Ald. 593. For other cases, in which the guaranty has been held not to be continuing, see Tayleur *v.* Wildin, Law Rep. 3 Exch. 303; Allnutt *v.* Ashenden, 5 Man. & Gr. 392; Bovill *v.* Turner, 2 Chitty, 205; Kirby *v.* The Duke of Marlborough, 2 Maule & Sel. 18.

CHAPTER VI.

OF CASES WHERE THE SURETY ON A GENERAL OBLIGATION IS LIABLE ONLY FOR LIMITED TIME OR ACT.

§ 138. **When liability of surety on general bond limited by the recitals thereof.**—When the words of the condition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond, specifying the time during which the prescribed duty is to be performed by the principal, the general words will be limited by the recital, and the surety will only be liable for the time therein specified. The reason is that, taking the whole instrument together, it is but fair to presume that the parties had in contemplation only a liability for the time specified. It is a rule of construction, adopted for the purpose of effectuating the intention of the parties. In the leading case on this subject, a bond recited that Thomas Jenkins had been appointed deputy postmaster, "to execute the said office from the twenty-fourth day of June next coming, for the term of six months," and was conditioned for his good behavior "during all the time that he, the said Thomas Jenkins, shall continue deputy postmaster." Jenkins held the the office more than two years, and the surety was sued for a default of his happening two years after his appointment. Held, the surety was not liable for anything happening after the first six months. The general words of the bond were restrained by

the special ones. "This time, which is indefinite in itself, ought to be construed only for the said six months for which the condition recites that Jenkins was appointed to be deputy postmaster, and to which the condition relates."[1] The condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues "from time to time for twelve months," and afterwards stipulating that, "at all times thereafter, during the continuance of his employment, and for so long as he should continue to be employed," he should justly account and obey orders, etc., confines the obligation to the period of twelve months mentioned in the recital.[2] In construing an agreement in the form of a bond, in which a surety became liable for the due fulfillment of an agent's duties, therein particularly ennumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses specifying the extent of the agency. Held, accordingly, that money received by an agent on account of his employers, during the time of his agency, but not in pursuance of the particular agency, disclosed to the surety by the specified conditions in the bond, were not covered by the surety's obligation, "that during the whole time the said * (agent) shall continue to act as agent aforesaid, in consequence of the above recited agreement, he shall well and truly account for and pay to us (the employers) all sums of money received by him on our account."[3]

§ 139. **Surety on general bond of annual officer only liable for one year.**—Sureties on the general bond of an annual officer, are generally held to be liable only for one year. The sureties are presumed to have contracted with reference to the law, and the general words of the obligation are restrained and limited thereby. Thus, the office of sheriff being annual, and he being appointed and commissioned for one year, gave bond with surety conditioned for his good behavior "during his continuance in office." He acted a second year without a new nomination or commission, and without having renewed his bond: Held, the sureties were not liable for taxes collected by the sheriff the second year. The court said: "The expression in the bond, 'during the continuance in office,' must clearly have reference to the ac-

[1] Lord Arlington v. Merricke, 2 Saunders, 403, per Hale, C. J.

[2] Company of Proprietors of the Liverpool Waterworks v. Atkinson, 6 East. 507.

[3] Napier v. Bruce, 8 Clark & Finnelly, 470.

tual duration of the office by virtue of the appointment under which the bond was taken."[1] A bond made by the defendant's testator as surety for E, recited that E had been and still was collector of the land tax, etc., of a parish, and was conditioned for the due payment by him from time to time, and at all times thereafter, of all money which he should from time to time collect from the inhabitants of the parish on account of any tax then imposed, or which might thereafter be imposed. The office of collector was annual: Held, the surety was only liable for one year. The court said, that in order to make him liable for a longer time, the words of the bond must be clear and unmistakable. If he could be held for more than one year, he could, with equal propriety, be held for fifty years, or any length of time in the future.[2] Where, according to the by-laws of an insurance company the office of secretary was annual, and a secretary was appointed for a year, and gave bond conditioned for his good behavior "during his continuance in office by virtue of his appointment," and at the end of the first year, and for several years thereafter, he was re-elected without any new bond being required or given, it was held the sureties were only liable for the first year. If it were otherwise, there would be no limit to their liability, and no means by which they could terminate it.[3] A constable entered into a general bond for the performance of his duties as such, "agreeably to his appointment, and in conformity with the existing laws of the state." The office of constable was by law limited to a year, but there was a provision that all officers should hold until their successors were elected: Held, the sureties were not liable for any defalcation of the constable happening more than a year after his appointment, although no successor had been appointed, and he still held the office. The court said: "If a person is surety for the fidelity of another in an office of limited duration, or the appointment to which is only for a limited period, he is not obliged beyond that period. * The condition here is for the faithful performance of the duties of high constable, agreeably to his appointment, and in conformity with existing laws. * The commission, and the law under which it was

[1] Commonwealth v. Fairfax, 4 Hen. & Munf. (Va.) 208, per Roane, J.

[2] Hassell v. Long, 2 Maule & Sel. 363, per Ld. Ellenborough, C. J.

[3] Kingston Mut. Ins. Co. v. Clark, 33 Barb. (N. Y.) 196. To the same effect, see Welch v. Seymour, 28 Ct. 387; South Carolina Society v. Johnson, 1 McCord Law (So. Car.) 41.

made, necessarily enter into the obligation in construing its extent, and must be considered by the court."[1]

§ 140. **Surety on general bond of annual officer only liable for a year.**—The sureties on the bond of the treasurer of a manufacturing corporation, who by statute is to be chosen annually, "and hold his office until another is chosen and qualified in his stead," where the bond is general for his good behavior and not restricted as to time, are bound only for the year for which he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor, although the corporation fail to elect a successor at the next annual meeting. The court said that where the office is annual, the general words of the bond are restrained by that fact. The liability of the sureties is not limited to a year exactly, but may extend a few days longer, till the usual time for holding the meetings of the officers of the corporation. The words "hold his office till another is chosen," may be applied to this fact, and should not change the general rule.[2] A collector of church and poor rates gave bond with surety, conditioned that he would account to the church wardens "and their successors" for all money received by him. The office of the wardens was annual, and as a consequence that of the collector was annual also. Held, the sureties were only liable for the collector's acts during one year. The court said the words "and their successors" meant that he must account to the successors for acts done by him during the first year, to the successor of one if he died during the year, or to the successors of all at the end of the year.[3] Certain sureties became bound for the acts of a collector of church rate, the office being an annual one. The bond was conditioned for the collector accounting "unto the wardens of the grand account for the time being or hereafter to be, of all such sum and sums of money so by him collected and received." Held, the sureties were not liable after the first year. The court remarked: "Can we say that they intended to be bound for an indefinite period?"[4] The office of county treasurer being annual, a treasurer was elected in 1790, and gave bond with surety, conditioned that he should

[1] Mayor, etc., of Wilmington *v.* Horn, 2 Har. (Del.) 190, per Harrington, J.

[2] Chelmsford Co. *v.* Demarest, 7 Gray, 1 per Shaw, C. J.

[3] Leadley *v.* Evans, 9 Moore, 102, per Best, J.

[4] The Wardens of St. Saviors Southwark *v.* Bostock, 5 Bos. & Pul. 175, per Mansfield, C. J.

"faithfully discharge the duties of the office of treasurer of said county, and account for all sums of money which he * (should) receive for the use of the said county." He was elected annually till 1806, but gave no new bond. Held, no recovery could be had on the bond for anything transpiring after the first year.[1] The office of tax collector being by act of Parliament an annual one, a collector gave a bond with surety, which recited his appointment under the act, and was conditioned for the due collection by him of the rates and duties at all times thereafter. Held, the due collection of taxes for one year was a compliance with the bond. With reference to the general words of the bond, the court said: "These words must be construed with reference to the recital and to the nature of the appointment there mentioned."[2]

§ 141. **When surety on general bond only liable for one year.**— The condition of a bond was that the principal should "from time to time, and at all times, so long as he * (should) continue to hold said office or employment," faithfully demean himself as clerk. To a suit on this bond against the surety, he plead that the employment of the clerk was only for one year, and that no default had happened within the year. Replication that by consent of all parties the clerk was retained longer than a year. Held, the replication was bad.[3] A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty as deputy, "during his continuance in office," without specifying the length of time, is binding on him and his sureties for the transactions of one year only, the term of the high sheriff being limited to that time.[4] Debt against a sheriff and his sureties, on a bond dated March, 1820, conditioned for the faithful discharge of the sheriff's duties until the next August election, and until his successor should be elected and qualified. The breach assigned, was that the sheriff had failed to pay over, etc., the revenue of the county for 1822. Held, that although the sheriff may have been elected his own successor, and may have neglected to qualify under the new appointment, still the sureties were not liable for his acts after he received his new commission.[5] The

[1] Bigelow v. Bridge, 8 Mass. 275; to same effect, see Riddel v. School District, 15 Kansas, 168.

[2] Peppin v. Cooper, 2 Barn. &. Ald. 431, per Abbott, C. J.

[3] Kiton v. Julian, 4 Ellis & Black. 854.

[4] Munford v. Rice, 6 Munf. (Va.) 81.

[5] Rany v. The Governor, 4 Blackf.

condition of a bond recited that S had been appointed (under a statute making the office annual) treasurer of a borough, and it provided that he should duly perform the office according to the provisions of said statutes, and of "such statutes as should be thereafter passed relating to said office." He continued to hold the office for several years under successive appointments, and did not comply with certain statutes passed subsequent to the first year. Held, his sureties were not liable for such default. The words "such statutes as should be thereafter passed," meant such as should be passed during the first year.[1] Where a statute provided that the period of administration on estates should be one year, but if the estate was not settled at that time, the judge might extend it a year, and so on for five years, it was held that the sureties on a general bond of an administrator, given when the administration commenced, were only liable for one year.[2] The office of register in chancery being annual, a party was appointed to it, and gave bond conditioned for his good behavior "whilst he shall continue in the office," and also "during the time he hath officiated in the said register's office." He continued in office four years. Held, the sureties were not liable beyond the first year. The court said: "The provisions of the constitution (making the office annual) form the basis of the contract, and like the recital in the condition of the bond, restrain the indefinite expressions used in it, and adapt them to the intention of the parties."[3]

§ 142. **When liability of surety on general bond limited by circumstances—Instances.**—A bond, reciting that A had been appointed assistant overseer of a parish, was conditioned for the due performance of his duties, "thenceforth from time to time, and at all times, so long as he should continue in such office." The office was not annual, but the overseer was appointed annually thereafter for several years, and at an increased salary. Held, the sureties on the bond were not liable for anything happening after his re-appointment at an increased salary. The re-appointment on different terms, was a revocation of the first appointment.[4] A treasurer was appointed by the governor, and gave

(Ind.) 2; to similar effect, see Moss v. The State, 10 Mo. 338.

[1] Mayor of Cambridge v. Dennis, Ell. Black. & Ell. 660.

[2] Flores v. Howth, 5 Texas, 329.

[3] State v. Wayman, 2 Gill & Johns. (Md.) 254.

[4] Bamford v. Iles, 3 Wels. Hurl. & Gor. 380.

bond with surety, conditioned for his good behavior "as such treasurer," the term of office of a treasurer then being during the pleasure of the governor. Afterwards a statute was passed providing that the treasurer should be elected by the people, and hold office for three years. The same party was elected treasurer and gave a new bond. Held, the first set of sureties were not liable for the treasurer's default after his election. They may have been willing to be bound for him, if he held office during the pleasure of the governor, but not if the holding was for a fixed term.[1] Subsequent to the passage of the United States internal revenue act of 1864, the assistant treasurer of the United States, and treasurer of the branch mint at San Francisco, gave a bond conditioned as provided by the act of 1846. The bond provided that he should faithfully discharge the duties of his office, and all "other duties as fiscal agents of the government, which may be imposed by this or any other act." The act of 1864, which provided that stamps might be furnished to assistant treasurers, also provided that bond for the payment for the same might be required from them. Said assistant treasurer got stamps for which he gave no new bond, and did not pay for them. Held, the sureties on the general bond were not liable for the stamps. If Congress had supposed the general bond covered the case, why was a new bond provided for? The general words in the bond should not cover the case. "We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some obvious relation to such duties, and such as the sureties, acquainted with the duties of the various public officers, as usually devolved upon them by law, might reasonably be expected to contemplate at the time of executing the bond, as likely to be imposed upon their principal, in case the exigencies of government should require it, and not those duties which are more usually imposed upon, and more appropriately belong to an entirely different class of officers."[2] The sureties in a bond given by the register of wills for the performance of his duties generally, and the payment of all money received for the use of the State, are not responsible for collateral inheritance tax collected by him. The terms of his bond were broad enough to

[1] The Queen v. Hall, 1 Up. Can. C. P. R. 406.

[2] United States v. Cheeseman, 3 Sawyer, 424, per Sawyer, J., Field, J., concurring; see, also, on this subject, to same general effect, Holt v. McLean, 75 Nor. Car. 347.

cover this tax, but the act establishing the tax provided for the giving of a special bond therefor. The court said: "It seems to us very plain, therefore, that the general bond is not intended to secure either payment of these collections, or the giving of the special bond to secure them." [1]

§ 143. **When general obligation of surety limited by special circumstances.**—A bank cashier gave a bond with sureties for his good behavior in office. The charter of the bank would have expired in 1818, but before that time, and after the sureties signed the obligation, the charter was extended by act of the legislature. No new bond was given, but the cashier continued to act during the extended period. Held, the sureties were not liable for any of his defalcations, after the time when the original charter expired.[2] M required machinery for a cheese factory, and gave A an order for it, which he refused to fill without security. B thereupon wrote to A as follows: "I recommend M to you, and if he should fail in his promise to you for anything in your way, I consider myself jointly liable for the amount of $200, payable in six months to your firm." A thereupon filled the order. Held, the meaning of the guaranty, when considered with reference to the surrounding circumstances, was that it applied to the specific order M had given for machinery and to no other.[3] A and B executed a note for $4,000, payable on demand, the note being joint and several, and both appearing as principals, but B was in fact the surety of A, and that was known by a bank, to the cashier of which the note was payable. The note was made to enable A to raise money at the bank. The bank advanced A, from time to time, over $32,000, all of which was paid, and then advanced $2,000, which was not paid, and the bank thereupon sued A and B on the note. Held, B was not liable. The note was no more than an express guaranty for $4,000, and was exhausted by the first advance of that amount.[4] The bond of the treasurer of a manufacturing corporation provided for the faithful discharge of his duties "during the time for which he had been elected, and for and during such further time as he * (might) continue therein by any re-election or otherwise." He was re-elected at the next annual election, and served five months of that term, and then re-

[1] Commonwealth v. Toms, 45 Pa. St. 408.

[2] Thompson v. Young, 2 Ohio, 335.

[3] Boyle v. Bradley, 26 Up. Can. C. P. R. 373.

[4] Agawam Bank v. Strever, 16 Barb. (N. Y.) 82.

signed, and his successor was appointed and held seven months; at the next annual election, the first treasurer was elected again, and served, and committed defaults. Held, the sureties were not liable for such defaults. They were liable for more than one year by the express terms of the bond, but were only liable for a continuous holding. The fact that for awhile the principal did not hold the office, ended the liability of the sureties. "The word 'continue' excludes all idea of intermission in the office."[1]

§ 144. **When sureties on bond of annual officer bound for more than a year.**—While sureties on the general bond of an annual officer are usually held to be liable only for one year, because such is presumed to have been the intention of the parties, yet there is nothing to prevent such sureties from becoming bound for a longer time, and, if an intention to that effect clearly and unequivocally appears, they will be so held. Thus, the office of treasurer of a borough being annual, A was appointed thereto, and gave bond conditioned for the due accounting for all such moneys as he should or might recover or receive "in virtue of * said appointment as treasurer, as aforesaid, during the whole time of * continuing in said office, in consequence of the said election, or under any annual or other future election of the said council to said office." Afterwards, and during the year, the term of office was by statute changed to a holding during the pleasure of the council, and at the expiration of the year A was again appointed treasurer, and continued in office a long time. Held, the sureties were liable for defaults of A happening after the first year.[2] By statute, the commission of an auctioneer did not necessarily expire in one year, but might continue for three years without renewal of his bond. M. having applied for appointment as auctioneer, gave bond conditioned that he should perform all the duties of auctioneer, etc., "during the period he * (should) continue to act as auctioneer under the commission that * (might) be granted to him." He was afterwards commissioned for one year. Held, the liability of the sureties did not expire in one year, but continued while M acted as auctioneer.[3] A bond given to secure the faithful performance of his duties

[1] Middlesex Manf. Co. *v.* Lawrence, 1 Allen, 339 per Dewey, J.

[2] Oswald *v.* Mayor of Berwick, 5 House of Lords, Cas. 856.

[3] Daly *v.* Commonwealth, 75 Pa. St. 331. Holding the sureties on a guardian's second bond, given upon his removal to a new county, liable for a defalcation before committed by him, see State *v.* Stewart, 36 Miss. 652.

by a collector of parochial rates (who was by statute to be appointed by trustees for a year and then to be capable of re-election), was conditioned that "from time to time, and at all times thereafter, during such time as he should continue in his said office, whether by virtue of his said appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority of the said trustees, or their successors, to be elected in the manner directed by the said act, he should use his best endeavor to collect the moneys received by means of the rates in the then present or in any subsequent year." Held, the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed.[1] A statute provided that the sureties of a clerk should be liable for the whole period he might continue in office, and his bond provided for his good behavior "during the whole period the said * shall or may continue in the said office." The clerk was re-elected for a new term, but gave no new bond. Held, the sureties on his original bond were liable for his acts during his second term. The Court based its decision upon the express provisions of the statute and the terms of the bond, and held that a recital in the beginning of the bond, that the clerk had been elected for four years did not change the result.[2] The commission of a collector of customs appointed him "a collector of Her Majesty's customs in the province of Canada," and the bond was conditioned for the performance of his duties generally. In a suit on the bond, the surety plead that the bond was executed in reference to the office of collector at B, and that he made no default while at B, but was transferred to another place, and there made default. Held, the plea was bad, as the bond was clearly general and could not be narrowed in its application by alleging that something less was meant.[3] In 1831, while a statute was in force which provided that a cashier should hold his office until removed therefrom or another was appointed in his stead, a cashier was appointed, and gave bond for the faithful discharge of the duties of his office. In 1832 he was re-appointed, but gave no new bond. The record of his appointment both times stated

[1] Augero v. Keen, 1 Mees. & Wels. 390.

[2] Treasurers v. Lang, 2 Bailey Law (So. Car.) 430.

[3] Regina v. Miller, 20 Up. Can. Q. B. R. 485.

that he was appointed "for the year ensuing." He held the office without any new appointment till 1836, when he committed a default. Held, the sureties on the bond given when he was first appointed, were liable therefor. The law made the office a continuing one, and the parties had this fact in contemplation when the bond was made.[1]

§ 145. **When general words of obligation not limited by other words or circumstances.**—The liability of sureties on the general bond of a manufacturer of tobacco, given in pursuance of the United States revenue law, does not cease upon the expiration of his license as such manufacturer. The provision of the law making the neglect of a manufacturer of tobacco to procure a license a punishable offense, was not designed for the benefit of sureties, but to protect the government against the frauds of the manufacturer.[2] The office of tax collector continued two years, but the law required the collector to give a bond as to the state taxes every year. The bond given by a collector on going into office, recited that he had been elected for two years, and provided that he should "well and truly collect all state taxes which, by law, he ought to collect, and well and truly account for and pay over all taxes by him collected, or which ought to be by him collected, according to law:" Held, the sureties were liable for the state taxes received by the collector the second year.[3] A statute provided that a sheriff should hold office for one year, and might "with his own consent and the approbation of the executive, be continued for two years." The first year a sheriff held office, a deputy gave bond conditioned for his good behavior "for and during the time said * (sheriff) may continue in office." The sheriff continued in office two years: Held, the sureties on the bond of the deputy were liable for his acts during the second year.[4] When the bond of an officer is general in its terms, and the office is not annual, the liability of the surety is not, in the absence of special circumstances, limited to a year.[5] A party was elected cashier of a bank in 1814, when it was first organized, and again in 1815 and 1817, by directors chosen annually, and he continued to act as cashier from his first election till 1823, when he com-

[1] Amherst Bank *v.* Root, 2 Met. (Mass.) 522.

[2] United States *v.* Truesdell, 2 Bond, 78.

[3] Allison *v.* The State, 8 Heisk. (Tenn.) 312.

[4] Jacobs *v.* Hill, 2 Leigh (Va.), 393.

[5] Mayor of Birmingham *v.* Wright, 16 Ad. & Ell. N. S. 623.

mitted a breach of duty: Held, a bond given by him, with sureties, upon his first election, for the faithful performance of his duties "so long as he should continue in said office," covered this breach of duty, it not appearing in the bond or the charter, or regulations of the bank, that the office was annual. "There was nothing to make the sureties suppose it was limited to a year."[1] A deed of guaranty made in Lower Canada by C, recited that one M, who had been a member of the firm of C & Sons, required pecuniary assistance to meet the engagements of that firm, which was agreed to be afforded by a bank, and by such guaranty C and others agreed to become sureties for all the then present and future liabilities of M with the bank. M contracted debts with the bank which had no reference to the firm of C & Co.: Held, that although the recital in the instrument was special, yet it did not control the generality of the subsequent operative words, and that the guarantors were liable for such advances.[2]

§ 146. **When general words of obligation not limited by other words or circumstances.**—By statute the term of office of the chairman of the superintendents of schools continued for one year, and until his successor was appointed. Held, the sureties on his bond were liable for money received by him more than a year after he was appointed, he being then in office, and no successor having been appointed; the decision being put upon the ground that his term of office continued until a successor was appointed.[3] A bond recited that A had been taken into the service of a bank, as a writing clerk, and was conditioned for his due performance of that service, "and all and every other service of the * (bank), wherein he is, or shall, or may be, employed." He was afterwards appointed cashier of a branch bank of the bank to which the bond ran, and afterwards made default. Held, his sureties were liable for such default.[4] A bond recited that the principal had been appointed accountant in a bank, and provided that he should well and faithfully perform all duties in the bank which from time to time might be required of him, and should faithfully account for all moneys which might be entrusted to his care, and should "also continue in said service for the term of

[1] Dedham Bank v. Chickering, 3 Pick. 335, per Parker, C. J.

[2] Bank of British North America v. Cuvillier, 14 Moore's Privy Council, Cas. 187.

[3] Chairman of Schools v. Daniel, 6 Jones Law (Nor. Car.) 444.

[4] Thompson v. Roberts, 17 Irish Com. Law Rep. 490, held by a divided Court.

two years, unless sooner discharged." Held, the bond covered the acts of the accountant as long as he continued in the office, and was not limited to two years.[1] The defendant, as surety, executed a bond, the condition of which recited an agreement between the directors of an East India railway company and P, whereby it was agreed that P should forthwith proceed to such place in the East Indies, at such time and by such conveyance as the company should direct, and should there serve the company at a certain salary per month, to commence on the day of his embarkation at Southampton. The condition was in the terms of the recited agreement, but mentioned no place of embarkation. The company paid P's passage on a vessel about to leave Southampton, but the vessel left before he was ready, and the company directed him to go to Marseilles and meet the vessel. This he failed to do, nor did he go to the East Indies. Held, the surety was liable. The words in the recital, "his embarkation at Southampton," only referred to the time his salary was to commence. The surety agreed that he should go in the manner the company directed, and the general words were not restrained by anything in the recital.[2] The bond of a note clerk in a bank provided for the faithful performance of his duties, and recited that he "had been appointed note clerk, to continue in office during the will of the present or any future board of directors of said bank." The directors of the bank were annual officers, but there was no limitation as to the time a note clerk should continue in office. Held, the liability of the sureties on the clerk's bond was not limited to one year. The clerk was not clerk of the directors, but of the bank, and the term of office of the clerk was not limited by the official term of the directors.[3]

[1] Worcester Bank v. Reed, 9 Mass. 267.

[2] Evans v. Earle, 1 Hurl. & Gor. 1.

[3] Louisiana State Bank v. Ledoux, 3 La. An. 674.

CHAPTER VII.

OF THE LIABILITY OF ACCOMMODATION PARTIES TO NEGOTIABLE INSTRUMENTS, AND OF THE BLANK INDORSER OF ANOTHER'S OBLIGATION.

§ 147. **When stranger to a note, who indorses it in blank, is guarantor.**—As to what is the precise liability of a stranger to an obligation who indorses it in blank, there is great conflict among the decided cases. The weight of authority is, that a stranger to a promissory note, payable to a particular person, who at or before the time of its delivery to the payee indorses it in blank, is, in the absence of evidence as to the liability intended to be assumed, liable as guarantor. The reasoning upon which these decisions are based is that such indorser intended to assume some liability. If he had intended to become a joint maker, he would have signed the note on its face. Not being a party to the note, the title to it does not pass by his indorsement, and he is not liable as indorser. And being neither principal nor indorser, in order to effectuate the presumed intention of the parties, he will be held liable as guarantor.[1] The same thing has been held

[1] Firman *v.* Blood, 2 Kansas, 496; Chandler *v.* Westfall, 30 Texas, 475; Pahlman *v.* Taylor, 75 Ill. 629; Fuller *v.* Scott, 8 Kansas, 25; Van Doren *v.* Tjader, 1 Nevada, 380; Heintz *v.* Cahn, 29 Ill. 308; Cushman *v.* Dement, 3 Scam. (Ill.) 497; Klein *v* Currier, 14 Ill. 237; Watson *v.* Hurt, 6

where a stranger to a note indorsed it in blank after it was delivered by the payee.[1] In such cases the holder of the note may at the time of the trial or any time before, write a guaranty over the name of the indorser,[2] and this may be done after the death of the indorser.[3] A party gave a storage receipt for grain, and a stranger to it indorsed it in blank for the purpose of becoming a guarantor. The grain was not delivered, and the holder of the receipt filled the blank above the name of the indorser with a guaranty, and sued on it. Held, the blank might be so filled, and that this took the case out of the Statute of Frauds. The court said: "On such an instrument he (the indorser) cannot become liable as indorser; nor can he become liable as maker unless he places his name on the instrument at the time of its execution, and as in such case, he manifestly intends to become liable in some capacity or other to the holder, it can only be as guarantor."[4] In the absence of evidence the presumption is that the blank indorsement of a note by a stranger was made at the time the note was executed.[5] And the same presumption exists where the instrument upon which the indorsement is made, is a receipt for the delivery of grain, and not negotiable.[6] It has been held that if the blank indorsement of a note by a stranger to it, is made after it has been in circulation, the indorser will not, in the absence of proof, be held as guarantor, but will be held as indorser simply, the presumption being that the note was transferred from holder to holder by blank indorsement.[7] A stranger to a bond, who indorsed it in blank and transferred it to his creditor in payment of a debt, has been held liable as guarantor.[8]

§ 148. **When stranger to a note who indorses it in blank is**

Gratt. (Va.) 633; Camden *v.* McKoy, 3 Scam. (Ill.) 437; Horton *v.* Manning, 37 Texas, 23; Clark *v.* Merriam, 25 Conn. 576; Champion *v.* Griffith, 13 Ohio, 228; *contra*, Levi *v.* Mendell, 1 Duvall (Ky.) 77.

[1] Thomas *v.* Jennings, 5 Smedes & Mar. (Miss.) 627; Killian *v.* Ashley, 24 Ark. 511; Stagg *v.* Linnenfelser, 59 Mo. 336.

[2] Boynton *v.* Pierce, 79 Ill. 145; Fear *v.* Dunlap, 1 Greene (Ioa.) 331; Chandler *v.* Westfall, 30 Texas, 475; Gist *v.* Drakely, 2 Gill, (Md.) 330; Leech *v.* Hill, 4 Watts, (Pa.) 448; *contra*, Needhams *v.* Page, 3 B. Mon. (Ky.) 465.

[3] Horton *v.* Manning, 37 Texas, 23.

[4] Underwood *v.* Hossack, 38 Ill. 208, per Walker, J.

[5] Carroll *v.* Weld, 13 Ill. 682; Webster *v.* Cobb, 17 Ill. 459; White *v.* Weaver, 41 Ill. 409; Boynton *v.* Pierce, 79 Ill. 145; Cook *v.* Southwick, 9 Texas, 615.

[6] Underwood *v.* Hossack, 38 Ill. 208.

[7] Webster *v.* Cobb, 17 Ill. 459; White *v.* Weaver, 41 Ill. 409.

[8] Kearnes *v.* Montgomery, 4 West Va. 29.

guarantor.—By the common law of Connecticut, the blank indorsement of a note (negotiable or not negotiable) by a stranger to it, in the absence of evidence, implies *prima facie* a contract on the part of the indorser that the note is due and payable according to its tenor; that the maker shall be of ability to pay it when it comes to maturity, and that it is collectible by due diligence on the part of the holder.[1] Another court has held that when a person not before a party to a note, puts his name on its back out of the course of regular negotiability, he is not an indorser according to the strict commercial sense of that term. "He is termed a guarantor, and this is so whether his inscription is simply in blank, or preceded by the words 'I guaranty.' * A name written on the back of a note gave to the writer his title of indorser, and fixed the character of his liability. If the name was written without regular succession, according to commercial usage, a distinction in the description of the latter was instituted, and he was called 'guarantor.' This distinction, however, was only in name; the act performed by each is precisely the same; and it is a well settled and safe rule that the act discloses the intent. * Where one writes his name on the back of a promissory note, either in blank or accompanied by the use of general terms, his undertaking is attended with all the rights and all the liability of an indorser *stricti juris*."[2] In a later case in the same court, it is held that where a person not before a party to a note, indorses it before its delivery, his liability is that of a surety, and demand and notice are necessary in order to fix his liability, and the doctrine of the case last referred to is fully approved. The court said: "In England he is held to be a guarantor, and his contract is that the maker of the note will pay at maturity, or, if he does not, the guarantor will. No demand or notice is considered necessary as a condition precedent to fix the liability of the guarantor." After saying there was great conflict of authority, the court, speaking of guarantor and indorser, proceeded: "Each undertakes that the maker will pay the note at maturity, and in case of being compelled to pay it for the principal, each has recourse upon his principal to recover

[1] Ranson *v.* Sherwood, 26 Conn. 437. For other decisions of the same court, on this subject, see Clark *v.* Merriam, 25 Conn. 576; Castle *v.* Candee, 16 Conn. 223; Perkins *v.* Catlin, 11 Conn. 213.

[2] Riggs *v.* Waldo, 2 Cal. 485, per Heydenfeldt, J.

the amount paid."[1] The law on this subject has been thus stated by another court: "The mere indorsement upon a note, of a stranger's name in blank, is *prima facie* evidence of guaranty. To charge such person as a maker, there must be proof that his indorsement was made at the time of execution by the other party, or if afterwards, that it was in pursuance of an agreement or intention that he should become responsible from the date of the execution. Such agreement or intention may be proved by parol. The rule is the same whether the instrument is negotiable or not."[2] A made his note payable to B. It was afterwards transferred to C, who for a valuable consideration transferred it to D, and at the same time wrote his name in blank on its back. There was no other name on the back of the note. Held, C was liable as guarantor. The court said: "The defendant cannot be charged as a surety, for he was no party to the original contract. * Nor can he be charged as indorser, for the note was not indorsed by the payee."[3] A party made a note payable to himself or order, and two parties, strangers to the note, indorsed it. The blank above the names of the indorsers were filled with separate guaranties, and then the maker indorsed it and delivered it to the holder. Held, the indorsers were not liable as guarantors but as indorsers. "Where the note creates no valid obligation against the maker, and can create none until it is indorsed and transferred by the payee, the presumption is that the person writing his name in blank upon the back of the note, assumes the obligation of an indorser. Inasmuch as the note can never have any validity until the name of the payee appears upon it as an indorser, the person writing his name in blank upon the note, understands that when the note takes effect, his name will appear upon it as a second indorser, and it is rea-

[1] Jones v. Goodwin, 39 Cal. 493. In Bryan v. Berry, 6 Cal. 394, the Supreme Court of California decided that it made no difference on what part of a note the name of a party who was secondarily liable appeared, he was liable as indorser. It did not profess to follow authority, which it said was full of refinements and contradictions, but professed to adopt a safe and certain rule, free from all obscurity. Bryan v. Berry was, however, overruled by Aud v. Magruder, 10 Cal. 282. The decisions on this subject in California are very inharmonious. For other cases, see Pierce v. Kennedy, 5 Cal. 138; Brady v. Reynolds, 13 Cal. 31.

[2] Champion v. Griffith, 13 Ohio, 228. For other decisions of the same court, on this subject, see Parker v. Riddle, 11 Ohio, 102; Seymour v. Mickey, 15 Ohio St. 515.

[3] Whiton v. Mears, 11 Met. (Mass.) 563.

sonable to conclude that such was the position which he intended to occupy." And all persons receiving such note are by its form notified of these facts.[1]

§ 149. **When the blank indorser of a note is not a guarantor.** —After a promissory note became due, the holder agreed to extend the time of payment about ten months, if the maker would get F to indorse the note. Without knowing of this agreement, F indorsed the note in blank, only writing over his signature the date of making it. In a suit against F on the note, it was held he was not a maker nor indorser, and could not be held as guarantor, because a guaranty must be in writing, and if such, a guaranty might have been written over the signature, it had not been done.[2] The payee of a note indorsed it in blank. A guaranty was written over his name in a different hand. Held, the presumption was that the indorser was an assignor, and only secondarily liable. The court said: "The fact that a contract of guaranty is found written above the name of the indorser, in a handwriting not his own, would not of itself be sufficient to raise a presumption that it was done by his authority, or that the contract was there when he wrote his name, because the presence of his name is to be accounted for by the fact that as payee of the note, it was necessary for him to indorse it in order to give it negotiability. To hold that any person through whose hands a note may pass, can write a guaranty over a blank indorsement, and then require the indorser to disprove it, would be fruitful of fraud, and dangerous to every person who has occasion to receive and indorse a promissory note."[3] It has been held that where the name of a stranger to a note occupies the position as a second indorser, he cannot be held as guarantor, unless it is established by extraneous evidence that he agreed to become a guarantor.[4] Upon a note in this form: "We, A and B, as principal, and C and D as surety, promise to pay to the order of ourselves," etc., and signed on its face only by A and B, and indorsed successively by A, B, C and D, the liability of D is that of surety or joint promisor in a note payable to the order of the principals and by them indorsed. It was claimed that he

[1] Blatchford v. Milliken, 35 Ill. 434, per Beckwith, J.

[2] Moore v. Folsom, 14 Minn. 340.

[3] Dietrich v. Mitchell, 43 Ill. 40, per Lawrence, J.; see, also, on similar point, Klein v. Currier, 14 Ill. 237.

[4] Bogue v. Melick, 25 Ill. 91.

was an indorser only as the note was indorsed by the promisee. The court said that would have been so if the note had been in the usual form: "But this note is peculiar, and the application of the rule is controlled by the express declaration in the contract itself of the nature of the liability assumed."[1] With reference to the liability of a stranger to it, who indorses a note in blank, the following has been held: "When a man puts his name on the back of negotiable paper before the payee has indorsed it, he means to pledge in some shape his responsibility for the payment of it. * In the absence of legal evidence of any different contract, he assumes the position of second indorser; and * to render his engagement binding as to any holder of the note, the implied condition that the payee shall indorse before him, must be complied with, so as to give him recourse against such payee."[2] On the other hand, it has been held that where a person, not a party to a bill or note, indorses his name on it, he is presumed to have done so as a surety, and not as an indorser; and if such indorser signs his name, thus intending to become indorser and not surety, it will make no difference, as it is an error of law which will not avail him in the absence of fraud by the other party.[3]

§ 150. **Cases holding blank indorser of note liable as indorser, and express guarantor liable as maker.**—A stranger to a note before its delivery wrote upon its back the following: "For value received I guaranty the payment of the within note, and waive notice of non-payment." Held, this constituted him a joint maker of the note, and that he could be sued jointly with the other makers. The court said "How is this distinguishable from a direct signature as surety?" In the latter case both promise to see the money paid at the day. A man writes thus: 'I promise that $100 shall be paid to A or bearer;' who would doubt that such a promise would be a good note? The use of the word guaranty, or warrant, or stipulate, or covenant, or other word importing an obligation, does not vary the effect. Read the obligation of a man who signs a note with his principal 'A. B. surety;' both and each stipulate in the language of the note I have supposed. Both promise that the payee shall receive."[4] The same court

[1] National Pemberton Bank v. Lougee, 108 Mass. 371, per Colt, J.

[2] Eilbert v. Finkbeiner, 68 Pa. St. 243, per Sharswood, J. To same effect, see Sill v. Leslie, 16 Ind. 236.

[3] Smith v. Gorton, 10 La. (Curry) 374.

[4] Luqueer v. Prosser, 1 Hill (N. Y.) 256, per Cowen, J.

held that a party who in express terms guarantied the payment of a note, was not an indorser, but was a guarantor, and that he did not come under the designation of an indorser, within the terms of a statute providing for the severing of actions in suits against makers and indorsers of notes.[1] A stranger to a negotiable note indorsed it in blank before it was delivered. No demand of payment had been made, nor had notice of dishonor been given the indorser. Held, he was not liable on his indorsement. He was an indorser and could not be held as a guarantor. The court said that an indorser, even though a stranger to a note and signing before its delivery, could not be held as a guarantor unless it was impossible to hold him in any other character. If the note was negotiable, he could not be held as guarantor. But if it was not negotiable, he might be held as guarantor, because in such case, as there is "no possibility of raising the ordinary obligation of indorser, there is then room to infer that a different obligation was intended." The question depends entirely on the fact of negotiability.[2] It was subsequently held by the same court that a stranger to a non-negotiable note, who before its delivery, indorsed it in blank, was liable either as maker or guarantor, and not as indorser.[3]

§ 151. **When blank indorser of note is liable as joint maker.**—There is a class of cases peculiar to New England, which hold that, in the absence of evidence, a stranger to a promissory note, who indorses it in blank before its delivery, is liable as a joint maker. The reasoning upon which these decisions rest, is thus stated by the Court: "He is not liable as indorser, for the note is not negotiated or title made to it through his indorsement, nor as guarantor, because there is no separate or distinct consideration; but he means to give security and validity to the note by his credit and promise to pay it, if the promisor does not, and that upon the original consideration, and, therefore, he is a promisor and surety, and it is immaterial to this purpose on what part of the note he places his name."[4] The same court held that

[1] Miller v. Gaston, 2 Hill (N. Y.) 188.

[2] Hall v. Newcomb, 3 Hill (N. Y.) 233; affirmed by the Court of Errors; Hall v. Newcomb, 7 Hill, 416; to same or similar effect, see Seabury v. Hungerford, 2 Hill, 80; Ellis v. Brown, 6 Barb. (N. Y.) 282; Tillman v. Wheeler, 17 Johns, 326; Spies v. Gilmore, 1 New York, 321.

[3] Richards v. Warring, 4 Abbott's Rep. Omitted Cas. 47.

[4] Per Shaw, C. J., in Chaffee v. Jones, 19 Pick. 260; Baker v. Briggs, 8 Pick. 122; Martin v. Boyd, 11 New Hamp.

strangers to a note, who before its delivery indorsed their names in blank upon it, were not liable as joint makers, if the payee afterwards and before its delivery indorsed his name upon it above theirs. The Court said that the rule holding indorsers in any case to be joint makers, was anomalous and peculiar to Massachusetts, and should not be extended beyond what the Court was bound to do by previous decisions.[1] Where a stranger to a non-negotiable note, at the time it was made, indorsed it in blank, it was held that in the absence of proof he was liable as an original promisor or surety, and might be sued jointly with the maker.[2] It has also been held that, where it is the intention of the parties that an indorser shall be a joint maker, it makes no difference if his signature appears on the back of the instrument, and he is liable to be sued jointly with the other maker.[3] A corporation made a promissory note under seal. A stranger indorsed it, and was sued on such indorsement. Held, the right of action was not on the sealed instrument, but on the indorsement, which was a collateral and distinct contract, and the indorser having become such on a valuable consideration, became absolutely liable to pay the money.[4]

§ 152. **Liability of blank indorser—General observations.**—The law with reference to the liability of the blank indorser of a promissory note has been thus summarized by a court of high authority: "When a promissory note, made payable to a particular person or order, * is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the undertaking of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract

385; Flint v. Day, 9 Vt. 345; Sanford v. Norton, 14 Vt. 228; Strong v. Riker, 16 Vt. 554; to same effect, see Chaffee v. The Memphis, C. & N. W. R. R. Co., 64 Mo. 193.

[1] Clapp v. Rice, 13 Gray, 403.

[2] Cook v. Southwick, 9 Texas, 615; see, also, Good v. Martin, 17 Am. Law Reg. 111.

[3] Schmidt v. Schmaelter, 45 Mo. 502.

[4] Gist v. Drakely, 2 Gill (Md.) 330.

with the payee, for further indulgence or forbearance, he can only be held as guarantor. But if the note was intended for discount, and he put his name on the back of it, with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such, would clearly be entitled to the privileges which belong to such indorsers."[1] It is apparent from the cases which have been cited, that the question, "What is the liability which, in the absence of explanatory evidence, the law imposes upon the blank indorser of the obligation of another?" is one to which no answer can be given that will harmonize all the authorities. The decisions have been almost as various as the forms of the obligations indorsed. Some courts have held that the nature of the liability depended entirely on whether or not the indorsed instrument was negotiable, while other courts have held that the nature of the liability was not at all affected by the fact of the negotiability of the indorsed instrument. A controlling influence has in numerous other respects been given to circumstances by some courts which have been wholly ignored by others. Nor is the conflict of authority confined to courts of different states, but there are several instances of the same court holding different views of the subject at different times. Other courts, while following their own former decisions, have admitted they were contrary to the weight of authority. It follows, of course, that no general rules can be laid down.

§ 153. **Liability of blank indorser may be shown by parol—Writing unauthorized agreement above blank indorsement, does not vitiate actual agreement.**—It is, however, well settled that the agreement upon which the blank indorser of another's obligation signed, and the liability which he intended to assume, may (at least, between the original parties, or those parties and a holder with notice,) be shown by parol evidence, and he will be held only according to such agreement and intention.[2] The fact that the in-

[1] Rey *v.* Simpson, 22 Howard (U. S.) 341, per Clifford, J.; see, also, Good *v.* Martin, 17 Am. Law Reg. 111; Burton *v.* Hansford, 10 West Va. 470.

[2] Sanford *v.* Norton, 14 Vt. 228; Cook *v.* Southwick, 9 Texas, 615; Burton *v.* Hansford, 10 West Va. 470; Strong *v.* Ricker, 16 Vt. 554; Baker *v.* Briggs, 8 Pick. 122; Sill *v.* Leslie, 16 Ind. 236; Good *v.* Martin, 17 Am. Law Reg. 111; Rey *v.* Simpson, 22 Howard (U. S.) 341; Seymour *v.* Mickey, 15 Ohio St. 515; Perkins *v.* Catlin, 11 Ct. 213; Carroll *v.* Weld, 13 Ill. 682;

dorser's name is on the back of the obligation, is itself evidence that he intended to assume some liability, but what liability the writing does not in terms show. The parol evidence does not therefore contradict the terms of any writing. It merely establishes a contract which is consistent with the writing. It has been said that such instruments are anomalous, and the law not fixing the relation of the indorser, the intention of the parties controls. Again, it has been held that the introduction of parol evidence in such cases, is a well settled exception to the rule, which forbids written instruments to be contradicted or varied by parol, and is a necessity for the convenience of commerce. In a suit against the indorser of a note, he offered to prove by parol that he indorsed it as surety, and that it was understood between him and the creditor at the time the indorsement was made, that the note was to be paid by him out of money which he might collect from accounts of the principal then in his hands. The code provided that parol evidence should not be received beyond or against a written act. Held, the evidence was admissible. The court said: "The evidence offered was neither to contradict nor explain a written instrument, but to prove a collateral fact or agreement in relation to it." [1] With reference to the reception of parol evidence to explain a blank indorsement, another court has said: "Nor does this position impugn the doctrine that written contracts are not to be varied by parol, for here is no contract in writing. There is evidence of a contract of some kind, but its particular terms are not given on the paper, but are left to be ascertained by parol." [2] Where the payee of a bill of exchange brings suit against the two drawers, one of whom is served with process, and the other not, the one who is served may, at the trial, introduce parol evidence to show that he and the plaintiff, by a prior arrangement between themselves, were,

Clark v. Merriam, 25 Ct. 576; Smith v. Finch, 2 Scam. (Ill.) 321; Harris v. Pierce, 6 Ind. 162; Boynton v. Pierce, 79 Ill. 145; Levi v. Mendell, 1 Duvall, (Ky.) 77; Leech v. Hill, 4 Watts (Pa.) 448; Chandler v. Westfall, 30 Texas, 475; Lacy v. Lofton, 26 Ind. 324; Pierse v. Irvine, 1 Minn. 369. In Kellogg v. Dunn, 2 Met. (Ky.) 215, it was held that a blank indorser could not be shown by parol to be a joint maker, because that would be to contradict the instrument. And in Hall v. Newcomb, 7 Hill (N. Y.) 416; it was said on the same ground, that parol evidence would not be received to show that the blank indorser of a note intended to become a guarantor.

[1] Dwight v. Linton, 3 Robinson (La.) 57, per Murphy, J.

[2] Barrows v. Lane, 5 Vt. 161, per Phelps, J.

when they severally drew and indorsed the bill, joint sureties for the accommodation of the other drawer, and by such proof defeat the action, if he has paid upon the bill an amount equal to that paid by the plaintiff.[1] Where a note was indorsed in blank by a stranger to it, and the holder wrote over the indorsement a guaranty with waiver of notice, when such was not the agreement upon which the indorser signed, it was held that this did not, in the absence of fraud, vitiate the agreement actually made; and that such agreement might be recovered upon, notwithstanding the erroneous indorsement. The court said there was no alteration of a written contract, because there was no written contract to be altered. There was only a blank indorsement, and the liability assumed by the indorser depended upon the agreement of the parties, and this was not affected by the erroneous indorsement.[2]

§ 154. **When indorsement in terms expresses liability of indorser, he is held according to such terms.**—Where the indorsement in terms expresses the liability intended to be assumed by the indorser, there is no room for extraneous evidence or presumptions of law, and he will be held to the expressed liability, and to that only. Thus, where the indorsement, by a stranger, to a note was, "I guaranty the payment of the within note," it was held he was a guarantor only and not a maker or surety.[3] The payee of a note who signs his name to these words written on the back thereof, "I hereby guaranty the within note," is not liable thereon as indorser, but as guarantor.[4] The legal holder of a note but not the payee, indorsed upon it, "I warrant this note collectible when due." Held, he was a guarantor and not an indorser.[5] Two parties were bound to another as principal and surety. The note on which they were liable was due, and the creditor, who was pressing for payment, offered to take the notes of a third person, held by the principal, if the principal and surety would indorse such notes. This was done, the principal indorsing in blank, and the surety thus, "Sam'l K. Allen as security." Held, Allen was not liable as guarantor.[6] An engagement indorsed on a bill or

[1] Kelly v. Few, 18 Ohio, 441.

[2] Seymour v. Mickey, 15 Ohio St. 515. See, also, Riley v. Gerrish, 9 Cush. 104; Josselyn v. Ames, 3 Mass. 274; Sylvester v. Downer, 20 Vt. 355; Tenney v. Prince, 4 Pick. 385.

[3] Oxford Bank v. Haynes, 8 Pick. 423.

[4] Belcher v. Smith, 7 Cush. 482.

[5] Benton v. Fletcher, 31 Vt. 418. To a contrary effect when the express guarantor was the payee, see Partridge v. Davis, 20 Vt. 499.

[6] Allen v. Coffil, 42 Ill. 293.

promissory note, under seal, for $500, of the same date with the note, was as follows: "I hereby acknowledge to be security for the within amount of five hundred dollars until satisfactorily paid by" W. A. Held, the indorser was liable as surety and not as guarantor. The Court said: "The word security has an established and well known meaning in the minds of most people, and indicates an obligation to stand for the sum absolutely, unless discharged by the supine negligence of the obligor after notice. It is in broad contrast with the word guaranty, which imports a conditional liability if due steps are taken against the principal."[1] Where the indorsement on the back of a note was, "I transfer the within note to * (A) and guaranty the payment of the same," it was held, that this being a guaranty in terms, could not be recovered on as a blank indorsement. "There is no implication of a promise where one is expressed."[2] Where the payee of a note indorsed it as follows, "I assign the within note to * (A) and warrant the solvency of the maker," it was held he was not liable as a general indorser, but that his liability was restricted by the special terms of his indorsement.[3] Where strangers to a note, at the time it was made, indorsed it as follows, "We guaranty payment," it was held they were guarantors and not sureties, and could not require the holder to sue the maker, as provided by statute in the case of sureties.[4]

§ 155. **Liability of indorsers under special indorsements and circumstances.**—The owner of a negotiable note payable to another party and not transferred by indorsement, sold and delivered it for value, indorsing upon it his name, and in addition the words "Holden thirty days." Held, he was liable to pay the note on condition that payment was demanded of the maker, and he was notified of the maker's default within the thirty days and not otherwise.[5] A, B and C signed a note payable to D, and B and C added to their names the word "surety." E indorsed the note in blank, and it was discounted by D, and the money paid to E. In the absence of all evidence on the subject, it was held that E was the surety of the other parties to the note,

[1] Marberger v. Pott, 16 Pa. St. 9 per Coulter, J.

[2] Snevily v. Ekel, 1 Watts & Serg. (Pa.) 203.

[3] Turley v. Hodge, 3 Humph. (Tenn.) 73.

[4] Sample v. Martin, 46 Ind. 226.

[5] Knight v. Knight, 16 New Hamp. 107.

and that he was discharged by time given them.[1] A stranger to a note indorsed it as follows: "I assign the within note as security to Charles C. Jones." Jones was the payee of the note, and the indorsement was made subsequent to the making of the note. Held, the indorser was not a joint maker, and could not be sued jointly with the maker.[2] It has been held that one who purchases an unindorsed negotiable note and afterwards writes his name with the word "holden" on its back, and sells it for value, is chargeable as guarantor.[3] A wrote on the back of a note, then two years past due, the following: "We waive time notice, and protest and guaranty the payment of the within." Held, such guarantor did not assume payment of the debt at any particular time, and the circumstances of the guaranty might be alleged and proved to explain when payment was to be made.[4]

§ 156. **Liability of accommodation parties to bills of exchange—Special cases.**—It has been held that the indorsers of an accommodation bill of exchange are not joint sureties, but are liable to each other in the order of their becoming parties.[5] Where there were two drawers of a bill of exchange, and one of them was surety only, and the drawee having no funds of the principal in his hands, accepted and paid the bill with knowledge of the fact of suretyship, and afterwards sued the drawers to recover the amount paid, it was held, the law raised an implied promise to pay on the part of the principal, but there could be no recovery against the surety, even though he had signed as drawer, with the express intention of becoming bound as surety. A bill of exchange never imports an obligation on the drawer to pay the amount to the drawee. The contract was not sufficient to effectuate the intention and render the surety liable.[6] A drew a bill of exchange on B, which B refused to accept unless A procured some responsible party to sign the bill with him. A then procured C to sign the bill with him as drawer, C being merely a surety, and B knowing that fact. When the bill became due, B paid it out of his own funds, and sued A and C for indemnity. C claimed that he was not liable, because, the bill having been paid by the party on whom it was drawn, was dead, and there

[1] Bank of Orleans v. Barry, 1 Denio, 116.

[2] Goode v. Jones, 9 Mo. 866.

[3] Irish v. Cutter, 31 Me. 536.

[4] Donley v. Bush, 44 Texas, 1.

[5] Williams v. Bosson, 11 Ohio, 62. Holding the accommodation acceptor of a draft to be a principal, see Marsh v. Low, 55 Ind. 271.

[6] Wing v. Terry, 5 Hill (N.Y.) 160.

could be no recovery on it, and there was no implied assumpsit against him. The court held C was liable. "He must be taken to have put his name on the bill in view of the well established principle of law that if the drawer has no funds in the hands of the drawee to meet the payment of the bill at maturity, in consequence of which the latter has it to pay with his own funds, a right of action instantly arises in his favor, not, indeed, upon the bill, but in assumpsit, to recover the money thus advanced, founded upon an implied promise. This is one of the known fixed legal consequences resulting from the relation of drawer. * Upon general principles of law, the liability of a surety is co-extensive with that of the principal, and it is wholly unimportant whether the liability arises out of an express or implied understanding on the part of the principal. The surety is as much bound for the implied as for the express promises and undertakings of his principal; in this respect the law knows no distinction."[1] It has been held that the accommodation acceptor of a bill of exchange is not a surety, and is not discharged by time given the drawer. The court said: "He who accepts a bill, whether for value or to serve a friend, makes himself at all events liable as acceptor, and nothing can discharge him but payment or release."[2] A drew a draft at two months, addressed to E, payable to the order of B, and concluding as follows: "Charge the same to the account of your obedient servant." It was signed first by A, and then by C, the word "surety" being added to C's signature, and then as follows: D, "surety for the above surety." D signed the draft without C's knowledge. B discounted the draft, and sent it to E, who paid it without funds, under an agreement to that effect with A; afterwards D paid the draft to E, and sued C for indemnity. Held, he was not entitled to recover. C was not liable by the terms of the draft to the acceptors, and was liable to nobody on the draft unless the acceptors failed to pay, being in effect their sureties. Neither was he liable for money paid to his use, because he never desired the acceptors to advance any money for him.[3]

[1] Nelson *v.* Richardson, 4 Sneed, (Tenn.) 307, per McKinney, J. To same effect, see Dickerson *v.* Turner, 15 Ind. 4; Suydam *v.* Westfall, 2 Denio, 205; reversing Suydam *v.* Westfall, 4 Hill, 211.

[2] Fentum *v.* Pocock, 5 Taunt. 192; *Id.* 1 Marshall, 14, per Mansfield, C. J.

[3] Wright *v.* Garlinghouse, 26 New York, 539.

CHAPTER VIII.

OF THE NOTICE AND DEMAND NECESSARY TO CHARGE A GUARANTOR.

§ 157. **When guarantor must be notified of acceptance of guaranty—Reasons therefor.**—A question often arising upon commercial guaranties is, whether in order to charge the guarantor it is necessary that he be notified of the acceptance of the guaranty by the person acting upon it. When the guaranty is a letter of credit, or is an offer to become responsible for a credit which may or may not be given to another, at the option of the

party to whom the application for credit is made, the great weight of authority is that the guarantor must within a reasonable time be notified of the acceptance of the guaranty.[1] The most satisfactory reasons exist for these decisions. It is of the highest importance to the person thus offering his credit, that he should know he is to be looked to for payment. Knowing that fact, he can regulate his dealings with his principal accordingly. He will have an opportunity to secure himself and guard against loss. Concerning this subject, it has been said: "It would, indeed, be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character, and hold the writer responsible without giving notice to him that he had acted on it."[2] Another reason much relied upon by the courts, is that the transaction only amounts to an offer to gauranty until the party making the offer is notified of its acceptance, when the minds of the parties meet and the contract is completed. Where the transaction is admitted to amount only to an offer to guaranty, it is universally held that in order to charge the party making the offer, he must within a reasonable time be notified that his offer is accepted. The courts, however, differ more or less as to what is a guaranty, and what is an offer to guaranty.

§ 158. **Writer of general letter of credit entitled to notice of its acceptance.**—The rule that a guarantor of future credits is entitled to notice, applies with special force to general letters of

[1] This is the firmly settled doctrine of the Supreme Court of the United States, Edmondston *v.* Drake, 5 Peters, 624; Douglass *v.* Reynolds, 7 Peters, 113; Lee *v.* Dick, 10 Peters, 482; Adams *v.* Jones, 12 Peters, 207. These decisions have been, with few exceptions, followed and approved in the United States; Lawton *v.* Maner, 9 Rich. Law (So.Car.) 335; Sollee *v.* Meugy, 1 Bailey Law (So. Car.) 620; Claflin *v.* Briant, 58 Ga. 414; Burns *v.* Semmes, 4 Cranch Cir. Ct. 702; Shewell *v.* Knox, 1 Dev. Law (Nor. Car.) 404; Taylor *v.* McClung's Ex'rs. 2 Houston (Del.) 24; Tuckerman *v.* French, 7 Greenl. (Me.) 115; Kellogg *v.* Stockton, 29 Pa. St. 460; Bank of Illinois *v.* Sloo, 16 La. (Curry) 539; Menard *v.* Scudder, 7 La. An. 385; Kinchelse *v.* Holmes, 7 B. Mon. (Ky.) 5; Allen *v.* Pike, 3 Cush. 238; Mussey *v.* Rayner, 22 Pick. 223; Rankin *v.* Childs, 9 Mo. 665; Mayfield v. Wheeler, 37 Texas, 256; McCollum *v.* Cushing, 22 Ark. 540; Howe *v.* Nickels, 22 Me. 175; Geiger *v.* Clark, 13 Cal. 579; Cook *v.* Orne, 37 Ill. 186.

[2] Edmondston *v.* Drake, 5 Peters, 624, per Marshall, C. J.

credit: "For it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted."[1] A party gave a letter of credit to another, agreeing to guaranty payment for purchases made by that other, to a certain amount. The party purchased goods on the strength of the guaranty, but no notice was given the guarantor: Held, he was not liable. The court said: "A party giving a letter of guaranty, has a right to know whether it is accepted, and whether the person to whom it is addressed, means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to his future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose favor it is given."[2] A wrote to B, that if he would assume the debt of C, and procure the discharge of C's bail, he, A, would execute his note for 50*l*. B complied with the request, but did not notify A of the fact: Held, A was not liable. The court said: "When a proposition is made by a man for a thing to be done for himself, he must know when done, that it is done on his proposition. But when he proposes his responsibility for a thing to be done for another, he may not know that it is done, or even if he does, he will not know whether it was done on his proposition, or on the sole credit of the third person, or on some other security. * If he is to stand as surety, he must have the right to keep watch of his principal and his circumstances."[3] A gave B a letter of credit addressed to C in a distant city, and agreeing to guaranty any purchases which might be made by B of C, or any person to whom B might be introduced by C. Several parties sold goods on the strength of the guaranty, but no notice was given to A: Held, A was not bound.[4] A writing was as follows: "The bearer, * wishing to travel with my son, please furnish with a suitable stock, and all will be right:" Held, an offer to guaranty, and that the writer was not liable, unless the proposition was accepted, and

[1] Per Story, J., in Adams *v.* Jones, 12 Peters, 207.

[2] McCollum *v.* Cushing, 22 Ark. 540, per English, C. J.

[3] Oaks *v.* Weller, 13 Vt. 106, per Collamer, J. See, also, Peck *v.* Barney, 13 Vt. 93.

[4] Kinchelse *v.* Holmes, 7 B. Mon. (Ky.) 5. To the same effect, when the guaranty was a continuing one, addressed to no one in particular, see Menard *v.* Scudder, 7 La. An. 385.

he notified of such acceptance. The court said: "A mere offer not accepted, is not a contract; and a mere mental acceptance of a proposition not communicated to the party to be charged, is not an acceptance at all in the eye of the law. It is important to the interests of the business community that every one should know the extent of his liabilities, in order that he may take the proper measures to meet them."[1] A banker being in failing circumstances and anticipating a run on his bank, certain persons signed and published an instrument as follows: "We, the undersigned, agree to guaranty the depositors of Wm. E. Culver in the payment in full of their demands against said Culver, on account of money deposited with him. We have entire confidence in his ability to meet all demands on him." A depositor brought suit on this guaranty, alleging that he had a large amount of money in the bank when the guaranty was signed, and was about to withdraw it, but relying on the guaranty he permitted it to remain. Held, that under this state of facts such depositor must aver and prove notice to the guarantors of the acceptance of the guaranty, and a general averment of notice would not be sufficient. The court said "Where the offer is to guaranty a debt for which another is primarily liable in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor, but the creditor must notify the guarantor of his acceptance of the offer, or of his intention to act upon it. * The rule is that a person thus proposing to become surety for another is not bound to inquire as to the acceptance of his proposal, "but the creditor must show reasonable notice."[2]

§ 159. **When writer of guaranty, addressed to a particular person, must be notified of its acceptance.**—The rule is generally held to be the same where the writing is addressed to a particular person and is acted on by him. Thus, where a guaranty was as follows: "Gentlemen: * (A and B) wish to draw on you at six and eight months; you will please accept their draft for 2,000 dollars, and I do hereby guaranty the punctual payment of it," it was held the guarantor must be notified within a reasonable time of the acceptance of the draft.[3] A guaranty was as follows:

[1] Kellogg v. Stockton, 29 Pa. St. 460, per Lewis, C. J.

[2] Steadman v. Guthrie, 4 Met. (Ky.) 147.

[3] Lee v. Dick, 10 Peters, 482.

"I would recommend * (A) and go security for him to any reasonable amount, so you can fill his orders and feel yourself secure as when I was doing business with you." Held, the guarantor was not liable unless notified of the acceptance of the guaranty. The court said it made no difference if the guarantor had before verbally requested the creditor to give the credit, and proceeded: "It is difficult to imagine how precedent request alone can supply the place of subsequent notice, since after request made and proffer of guaranty, the merchant may refuse the credit or advance craved, and without notice the surety cannot know whether he has or not."[1] A applied to R to purchase lumber to build a ferry boat, and R refused to credit him without security. A mentioned the name of C as surety, and his name was acceptable. A few days afterwards A presented an order for the lumber in C's handwriting, at the foot of which was written "Messrs. Rankins (R) will furnish the above bill as soon as possible, and I will order what more I may want for my boat in a short time. James McCourtney (A). I hereby guarantee the payment of the above bill, January 29th, 1842. Wm. Childs" (C). The lumber was afterwards sold. Held, C must be notified of the acceptance of the guaranty in order to charge him.[2] The same thing was held where the defendants wrote to the plaintiffs as follows: "We take pleasure in commending Mr. C. to you as a gentleman worthy of your confidence, and if he should have any dealing with you we hereby bind ourselves to make good and pay any amount he may be indebted to you on settlement, not exceeding $1,500. This guaranty to remain in full force until revoked by us."[3] Where the writing was as follows: "For value received, I, Moses Dudley, of Chesterfield, New Hampshire, guaranty to pay James M. Beebe & Co., of Boston, for two thousand dollars' worth of goods delivered to Charles P. Dudley, of Lowell, when he may call for them," it was held that as the engagement related to goods to be delivered, and no time was fixed within which the delivery was to be made, it was a collateral agreement or guaranty, and not an absolute undertaking, and that the guarantor must in order to charge him, be notified within a

[1] Kay v. Allen, 9 Pa. St. 320, per Bell, J.

[2] Rankin v. Childs, 9 Mo. 665.

[3] Wardlaw v. Harrison, 11 Rich. Law. (So. Car.) 626.

reasonable time of sales made under it.[1] Where the maker of a continuing guaranty had no notice of its acceptance for three years, he was held not liable. In an able opinion the court summarized the law on this subject as follows: "In cases of a written guaranty for a debt yet to be created, and uncertain in its amount, the guarantor should have notice in a reasonable time that the guaranty is accepted, and that credit has been given on the faith of it. * The distinction is between an offer to guaranty a debt about to be created, the amount of which the party making the offer does not know, and it is uncertain whether the offer will be accepted so that he may be ultimately liable, and the case of an absolute guaranty, the terms of which are definite as to its extent and amount. In the latter case, no notice is necessary to the guarantor, whereas in the former case the contract is not completed until the offer is accepted."[2]

§ 160. **When guarantor entitled to notice of acceptance of guaranty—Special cases.**—If a promise be made to pay the debt of another, provided the creditor will take the debtor's note, payable at a distant day, the promisor must have notice that the proposition is acceded to and the note accepted, or he will not be liable on his guaranty.[3] A guaranty was as follows: "F informs me that you are about publishing an arithmetic for him. I have no objection to be answerable as far as 50*l.*: for my reference, apply to B." (Signed) G. T. The guaranty was written by B and signed by G. T., and then B wrote at the bottom, "Witness to G. T——. B." It was was forwarded by B to the plaintiffs, who never communicated their acceptance of it to G. T. Held, G. T. was not liable. The Court said: "The transaction cannot be tortured into a consummate and perfect contract. The contract was not complete till notice; and with regard to the agency of Brooke (B), there is nothing to show that the plaintiffs might not have been dissatisfied with his opinion of the defendant's solvency. * The subsequent words render the point quite clear that the defendant only intended to be bound by the instrument in case upon inquiry the plaintiffs should be satisfied with regard to his solvency."[4] A wrote to B that C de-

[1] Beebe *v.* Dudley, 26 New Hamp. 249.

[2] Allen *v.* Pike, 3 Cush. 238; per Wilde, J.

[3] Patterson *v.* Reed, 7 Watts & Serg. (Pa.) 144.

[4] Per Lord Abinger, C. B., and Parke, B., in Mozley *v.* Tinkler, 1

sired the loan of $15,000, and if B would loan it to C he would be responsible for that amount, and would leave as collateral for the loan, a mortgage for $15,000, then in B's hands, and that if B did not feel like loaning the amount he would assist C to get it elsewhere. Held, this was a guaranty, or an offer to guaranty, on the part of A, and in order to render him liable for any advances made, he must have notice of acceptance within a reasonable time. The Court said: "There is a marked difference between an overture, or proposition to guaranty, and a simple contract of suretyship. The one is a contingent liability. The other is an actual undertaking."[1] A wrote a letter to the plaintiffs, promising to accept and pay bills to the extent of $50,000, drawn on them by B, of Illinois, and discounted by the plaintiffs. C, by an indorsement on the letter, guarantied the payment of such bills as might be drawn in pursuance thereof. Bills to the extent of $37,000 were drawn, not paid, and protested. No notice was given to the guarantor of the acceptance of the guaranty, or the advances made thereon, until after the dishonor of the bills. Held, the guarantor was entitled to notice of the acceptance of the guaranty, and of the advances made under it, and that he was not liable, for want of such notice.[2] A party being about to purchase goods, exhibited to the seller a letter from a third party, addressed to the purchaser, containing, among other things, the following: "For the amount of such goods as you wish to purchase on six months' credit, not exceeding one thousand dollars, I will guaranty at two and a half per cent." Upon the faith of this he obtained goods, giving therefor his promissory note, payable in six months, with grace. Held, this was not an authority to the purchaser to bind the writer at all events, nor was the purchaser thereby constituted his agent for the purpose of receiving notice of its acceptance, but that it was a case of collateral guaranty, in which seasonable notice of acceptance was necessary to charge the guarantor.[3] It has been held that in an action for breach of an agreement, which is in the nature of a guaranty, if the circumstances alleged as the foundation of the defendant's liability are more properly within the

Cromp. Mees. & Ros. 692; *Id.* 5 Tyrwh. 416; *Id.* 1 Gale, 11.

[1] Central Savings Bank *v.* Shine, 48 Mo. 456, per Wagner, J.

[2] Bank of Illinois *v.* Sloo, 16 La. (Curry) 539.

[3] Bradley *v.* Cary, 8 Greenl. (Me.) 234.

knowledge of the plaintiff than the defendant, notice thereof should be averred in the declaration, and proved on the trial.[1]

§ 161. **When guarantor entitled to notice of acceptance of guaranty—Special cases.**—Where a party gave a letter of credit to another, addressed to certain merchants, stating: "Should you be disposed to furnish him with such goods as he may call for, from 300 to 500 dollars' worth, I will hold myself accountable for the payment, should he not pay as you and he shall agree," it was held to be a collateral undertaking, and that the guarantor was entitled to notice of the acceptance of the guaranty and the amount of credit given.[2] Where an offer of guaranty of rent for a year was made in writing, accompanied by a request in writing for an answer, it was held that the party making the offer must be notified of its acceptance, in order to charge him.[3] Part of a letter written by A to B, concerning a debt already contracted by third parties, was as follows: "I wish you to show him (James Hale) some lenity, as much as you think proper for the collection of it from Mr. Lovejoy, and I will, if you please, stand responsible for the payment of it at the time you and James may agree on." Held, this was an offer to guaranty, and not a completed contract; that the writer of the letter was entitled to notice of the acceptance of his offer within a reasonable time, and not having received any such notice for over two years, he was not bound.[4] A party addressed to certain merchants a note, stating that he would be responsible at the end of three years for goods sold to F, to the amount of $1,000. The merchants sold F goods on the strength of the guaranty to the amount of about $1,000, but did not notify the writer of the note of the acceptance of the guaranty, nor of the amount sold, till two years and eight months after the transaction. Held, the writer of the note was not liable. The court said: "Not only is this notice essential to that exactness and precision, as well as to the good faith and confidence which should characterize mercantile contracts, but it is equally demanded by a regard to the rights and interests of the defendant; and the most unjust results would follow were a contrary

[1] Lewis v. Bradley, 2 Ired. Law (Nor. Car.) 303.

[2] Rapelye v. Bailey, 3 Ct. 438.

[3] Valloton v. Gardner, R. M. Charlton (Ga.) 86; to similar effect, see Thomas v. Davis, 14 Pick. 353.

[4] Beekman v. Hale, 17 Johns. 134. To the effect that when the letter is an offer to guaranty, the writer must be notified of its acceptance; see Fellows v. Prentiss, 3 Denio, 512.

doctrine to prevail. He ought to have the notice to enable him to take such prudential measures as would guard him against eventual loss; to exercise a watchful supervision over the proceedings of him for whom he became responsible; to make payment, if necessary, and to secure himself by suit."[1] A letter, after introducing a party, proceeded as follows: "Any favor you may show in introducing him to the different houses, so that he may be able to fill his orders, will be highly appreciated by him, and will be indorsed by me, if necessary, for the amount of his purchases." Goods were sold on this letter, for which the purchaser gave his individual note, due in six months. No notice was given the writer of the letter till after the note was due. Held, he was not liable; his agreement being to guaranty if necessary; and he should have been promptly notified of the sale, or requested to guaranty the note.[2]

§ 162. **When guarantor entitled to notice of acceptance of guaranty—Special cases.**—Where I gave a writing to P providing that he would indorse any bill or bills which S might give to P in part payment of an order for certain goods then executing for him, I to allow *5l.* per cent. on the amount of the bills for the guaranty; and in part payment for the goods S gave P a bill at eighteen months, which the latter kept for seventeen months and ten days, and then finding that S was insolvent, applied for the first time to I for his indorsement, tendering the amount of commission, it was held I was not liable. The writing was a simple offer to guaranty upon being paid a consideration. If P intended to accept the offer he should have done so within a reasonable time, and paid the commission.[3] A wrote to B recommending certain parties and giving certain explanations, and added at the end of his letter: "If in addition to the foregoing explanation you shall require any individual guaranty, I shall have no objection to give you that pledge." Held, the letter was not a guaranty, but a statement that if an application was made, a guaranty would be given, and no guaranty having been required for more than two years, the inference was that the credit was given solely to the principal, and that the offer to guaranty was not accepted.[4] One H requiring some spirits for the pur-

[1] Craft *v.* Isham, 13 Ct. 28, per Bissell, J.

[2] Mayfield *v.* Wheeler, 37 Texas, 256.

[3] Payne *v.* Ives, 3 Dow. & Ryl. 664.

[4] Stafford *v.* Low, 16 Johns. 67.

poses of his trade, received from the defendant, a friend of his, a letter of introduction to the plaintiff, a distiller, to whom the defendant was well known, but H an entire stranger. There had not been any previous application by H to the plaintiff for credit. The letter was as follows: "The bearer is Mr. Joseph Hugill, a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction, I am sure that Mr. Hugill will prove a reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for." Held, this was not a guaranty, but an offer to guaranty, and in order to charge the writer of the letter it was necessary to notify him of the acceptance of the offer.[1] A guaranty was as follows: "Wm. Mitchell, Jr., will probably call on you to purchase your horse, and should you conclude to sell, you can do so. Take his note, and I will be responsible for the payment on his return." Held, that in order to hold the guarantor he must be notified of the sale. The court said: "In an action upon a guaranty, unless the instrument given in evidence as such, purports to be an absolute and conclusive engagement, the plaintiff must show that he gave notice to the defendant that he accepted it as such."[2] The plaintiff having declined to furnish goods to A's house on his credit alone, a writing was given to A by the defendant to this effect: "I understand A & Co. have given you an order for rigging, &c. I can assure you, from what I know of A's honor and probity, you will be perfectly safe in crediting them to that amount; indeed I have no objection to guaranty you against any loss from giving them this credit." This writing was handed over by A to the plaintiffs, together with a guaranty from another house, which they required in addition, and the goods were thereupon furnished, but the defendant was not notified that they were furnished nor that he was relied upon for payment. Held, the defendant was not liable. The writing was not a perfect and conclusive guaranty, but only a proposition tending to a guaranty.[3]

§ 163. **When guarantor must be notified of advances made under guaranty.**—When the guaranty relates only to a single

[1] Kastner v. Winstanley, 20 Up. Can. C. P. R. 101.

[2] Smith v. Anthony, 5 Mo. 504.

[3] McIver v. Richardson, 1 Maule & Sel. 557.

transaction, notice of its acceptance usually conveys to the guarantor knowledge of the extent of his liability; and in such case no other notice is necessary. Where, however, the guaranty is a continuing one, notice of its acceptance does not have this effect. In such case the same reasons which require notice of the acceptance of the guaranty, also require notice of the advances made under it. It has accordingly been held, and is well established. that in the case of a continuing guaranty, not only must notice of acceptance be given, but also within a reasonable time after all the transactions are closed, the guarantor must be notified of the amount due under the guaranty.[1] As to this matter, the following has been said by an eminent judge: "All such cases must stand upon their own circumstances, and do not seem to furnish just grounds for a general rule."[2] A notice of the amount due after all the transactions are closed, is sufficient, and it is not necessary to give notice of each successive sale as it is made.[3] The maker of a continuing guaranty was duly notified of its acceptance. Goods were sold under it, but no notice of the amount so sold, nor of default in payment by the principal was given till two years after the close of the transaction, when the principal had become insolvent: Held, the guarantor was not liable. The court said: "Good faith, we think, requires that when a party gives credit to another on the responsibility or undertaking of a third person, he should give immediate notice to the latter of the extent of the credit, especially when, as in the case under consideration, a continuing guaranty is given without limitation of the time of its continuance, or of the amount of credit for which the guarantor might be held responsible."[4] A, B and C were in partnership. D gave A and B a guaranty to be responsible for one-half of any loss which they might suffer in the business with C. The partnership having been dissolved, it was held that D was not liable on his guaranty, unless he had been notified within a reasonable time after the dissolution of the partnership, of

[1] 1 Douglass v. Reynolds, 7 Peters, 113; Montgomery v. Kellogg, 43 Miss. 486; Howe v. Nickels, 22 Me. 175; Wildes v. Savage, 1 Story, 22; Cremer v. Higginson, 1 Mason, 323; Norton v. Eastman, 4 Greenl. (Me.) 521; Killian v. Ashley, 24 Ark. 511; Babcock v. Bryant, 12 Pick. 133; Thomas v. Davis, 14 Pick. 353.

[2] Wildes v. Savage, 1 Story, 22, per Story, J.

[3] Lowe v. Beckwith, 14 B. Monroe, (Ky.) 150.

[4] Clark v. Remington, 11 Met. (Mass.) 361, per Wilde, J.

the company who will not sue, but indulge the company upon their claims for ten months from this time." Held, that a creditor of the company at that time, who indulged it ten months, was entitled to recover the amount of his debt against the company from said stockholders, without having notified them that he would so indulge it. The instrument signed by the stockholders was an absolute present guaranty, and not an offer to guaranty.[1] The following instrument, viz: "Mr. J. C., I will guaranty the payment to you of $625.00 in treasury warrants, to be paid on or before the 20th of August, on and for account of Mr. J. W., July 13th, 1844," was held not to be a guaranty in the legal sense of the term, but an original undertaking to pay J. C. the money specified at the appointed time, and no notice of any kind was necessary to charge the maker of the instrument.[2] A guaranty was as follows: "If D. A. Wills purchases a case of tobacco on credit, I agree to see the same paid for in four months." When Wills returned from market, he showed the guarantor a bill for a case of tobacco, saying he had bought it and paid for it with his note. The court held the guaranty was absolute, and notice of acceptance was not necessary to charge the guarantor. The only condition was that the goods should be furnished, and that was done. When Wills told the guarantor he had bought a case of tobacco, he should have inquired and ascertained the facts.[3] A agreed to furnish B with books for sale, at a certain price, upon condition that B should get a good guarantor to the contract. Upon the back of the contract was written as follows: "We guaranty to * (A) that the above named * (B) will well and truly perform all his above and foregoing undertakings, pursuant to the tenor and effect of said contract." C signed this guaranty, and B delivered it to A. Books were delivered according to the contract, but C was not notified of the acceptance of the guaranty. Held, he was liable for the price of the books. The court said: "An absolute present guaranty complete in its terms and fixing the liability of the guarantor, takes effect as soon as acted upon."[4] A guaranty was as follows: "Mr. A. Ferm tells me that he is about to loan from you five hundred dollars, and wishes me to state that I will become his event-

[1] Sanders v. Etcherson, 36 Ga. 404.

[2] Mathews v. Chrisman, 12 Smedes & Mar. (Miss.) 595.

[3] Case v. Howard, 41 Iowa, 479.

[4] Bright v. McKnight, 1 Sneed, (Tenn.) 158.

ual security for the payment; this I am willing to do, as I have found him punctual on similar occasions." Three hundred dollars were loaned on the faith of the guaranty: Held, no notice of the acceptance of the guaranty was necessary to charge the guarantor. "The substance of the letter is this: 'I will become his eventual security for payment.' Here is, then, no conditional agreement, but a conclusive undertaking."[1] A guaranty requested the delivery of goods to a purchaser, and promised to pay for them if the purchaser made default, and concluded as follows: "Of which default you are required to give us reasonable and proper notice:" Held, no notice of the acceptance of the guaranty need be given the guarantor to charge him. He had stipulated for a certain kind of notice, viz.: notice of the default of his principal, and, therefore, no other notice was required.[2] In the greater portion of the foregoing cases, holding notice of acceptance not necessary to charge the guarantor, as in many of the cases holding such notice necessary, the distinction is drawn between an absolute guaranty and an offer to guaranty. There is no conflict in principle between those cases, but in the application of the principle to special circumstances, there is not entire harmony in the decisions.

§ 166. **When guarantor not entitled to notice of advances made to principal.**—Upon the same general principles, where the guaranty is a completed undertaking to be responsible for the existing contract of another, of which the guarantor has knowledge, it has been held that no notice of advances to the principal is necessary to charge the guarantor.[3] A and B agreed to buy of C his crop of strawberries for the year, and to pay therefor on delivery. D added to the agreement this clause: "On the part of the said Dillons (A and B) I hold myself with them responsible for their part of the above contract." C delivered the berries to A and B, as they ripened, without being paid for them on delivery, or afterwards. D had no notice of the failure of A and B to pay, till suit was brought against him, three months after the delivery of the berries. It was held that D, by signing the contract, became directly and not collaterally liable, and it was his duty, without notice, to see that the contract was performed. De-

[1] Caton v. Shaw, 2 Harris & Gill. (Md.) 13.

[2] Wadsworth v. Allen, 8 Gratt. (Va.) 174.

[3] Bushnell v. Church, 15 Conn. 406.

livering the berries without getting pay for them as delivered, did not change the contract.[1] A, who was cultivating a large number of trees on his land, agreed in writing with B to cultivate them there till September 13th, and at that time to deliver to B, at the place of their growth, 15,000 trees, to be designated and counted by the parties. It was stipulated that if either party failed to perform his contract he should forfeit $3,000. Underneath was written as follows: "In case B, one of the parties named in the foregoing instrument, should incur the forfeiture mentioned therein, we hereby guaranty the payment of the same;" which was signed by C, as guarantor. A cultivated the trees as agreed, and was always ready to perform, but B failed of performance on his part. Held, that C was liable, and no notice of B's default need be given to fix his liability. The court said: "None is bound to give notice to another of that which that other person may otherwise inform himself of. Nor is notice necessary where the thing lies as much in the cognizance of the one as of the other. * In the present case * (C) was privy to the contract made by * (B); he, as well as * (A), knew its terms and its time of performance, and by an inquiry could have ascertained whether a forfeiture against which he had himself stipulated had occurred."[2] A party gave an agreement to pay his instalments on shares in an insurance company, and another party guarantied the performance of the agreement. Held, that although the amount which was to become due on the agreement was uncertain when it was made, yet notice of that amount was not necessary to be given the guarantor, as he himself should have taken notice of the amount. The court said that where the unascertained liability existed on the face of the original contract, it was the duty of the guarantor to see that the principal performed his contract.[3] A bond, signed by a principal and two sureties, stated that the principal required money to carry on his business, and required advances from the bank, and "in case of his failure to pay any such loans and advances as aforesaid," the same might be collected from the signers. The bank advanced money to the principal, but did not notify the sureties of the same. Held, no

[1] Kirby v. Studebaker, 15 Ind. 45.

[2] Hammond v. Gilmore's Admr. 14 Ct. 479, per Church, J.

[3] Protection Ins. Co. v. Davis, 5 Allen, 54.

such notice was necessary to charge the sureties. They were joint original promisors who were directly liable, and not guarantors who were collaterally liable.[1] A executed a writing whereby he agreed with B that he would at all times hold himself responsible to B to the amount of $20,000, without notice to be given to him by B. This writing was simultaneously delivered by A and accepted by B, and B on the credit thereof discounted paper indorsed by C. Held, that no notice of the acceptance of the guaranty or the amount advanced under it was necessary to charge A. The court said this was not such a case as that of a letter of credit. A letter of credit is a mere proposition and until it is accepted, and notice of that fact given, the minds of the parties have not met and there is no contract. "Its reception is unavoidable, its acceptance as a promise optional; its delivery is with a view to its acceptance, and must therefore necessarily precede it. Until such acceptance it is not consummated into a contract, but remains a mere proposition, and there has been no meeting of the minds of the parties." But in this case the delivery of the instrument "was not an incipient step in the formation of the contract, but the result of previous negotiation and agreement, and constituted the very consummation of the contract."[2]

§ 167. **Cases holding guarantor for indefinite amount on credit to be given, not entitled to notice of acceptance of guaranty.**—There is a class of cases which hold that where the guaranty relates to advances to be made, and the party to make them, as well as the amount to be advanced, are not ascertained, the guarantor is liable without notice of the acceptance of the guaranty, or of the amount advanced. These decisions, while they are the law where they were rendered, are opposed to the great weight of authority, and seem to be founded on much less satisfactory reasons than the cases holding the opposite view. But even here the conflict is more in the application of principles to special facts than in principles themselves. All courts recognize the principle that it is necessary to the completion of a contract that the minds of both contracting parties shall meet; the conflict is as to when they have met. They all hold that a mere offer to guaranty, the same as any other offer, is not binding unless

[1] McMillan v. Bull's Head Bank, 32 Ind. 11.

[2] New Haven Co. Bank v. Mitchell, 15 Ct. 206, per Storrs, J.

accepted; the conflict is as to whether the guarantor must be notified of the acceptance of the guaranty, and whether the writing amounts to an offer to guaranty or to a completed guaranty. A guaranty addressed to a mercantile firm in these words, "We consider Mr. J. good for all he may want of you, and will indemnify the same," was held to be a completed guaranty of the acceptance of which it was not necessary to notify the guarantor. The Court said: "Unless there is something in the nature of the contract or terms of the writing, creating or implying the necessity of acceptance or notice, as a condition of liability, neither are deemed requisite. * The party entering into an absolute engagement for the responsibility of his friend, should see to the performance of it. The relation in which the parties afterwards stand to each other presupposes privity and knowledge of the credit obtained."[1] A letter of guaranty was as follows: "If you will let A have one hundred dollars worth of goods, on a credit of three months, you may regard me as guarantying the same." Held, the guarantor was liable without any notice of the acceptance of the guaranty. "Here the undertaking was absolute. The defendant said to the plaintiff, in substance: 'If you will deliver the goods I will guaranty the payment.' We cannot add a condition that the defendant shall have notice. He should have provided for that himself in the proposal made to the plaintiff. I know there are cases which require notice, but we think they are not based on the common law, and for that reason they have not been followed in this state."[2] Where A, by a general letter of credit, undertook to accept and pay drafts to be drawn by B, to a given amount, and C, at the foot of the letter, at the same time, wrote and signed these words: "I hereby agree to guaranty the due acceptance and payment, of any draft or drafts issued in virtue of the above credit," it was held that C was liable to the party advancing money on the guaranty, without any notice of its acceptance.[3] A guaranty addressed to a merchant, after explaining who the bearer was, went

[1] Whitney v. Groot, 24 Wend. 82, per Nelson, C. J.

[2] Smith v. Dann, 6 Hill 543, per Bronson, J.

[3] Union Bank v. Coster's Exr., 3 New York 203; following and approving these cases, see Lonsdale v. Lafayette Bank, 18 Ohio, 126; Powers v. Bumcratz, 12 Ohio St. 273; overruling Taylor v. Wetmore, 10 Ohio 491; in Clark v. Burdett, 2 Hall (N. Y.) 217, this principle was applied to the case of a continuing guaranty.

on, "I want you to sell him a bill of goods on the best terms you can afford; I will guaranty the payment of every dollar." Held, no notice of the acceptance of the guaranty, or the default of the principal was necessary to charge the guarantor.[1] Where the agreement to accept a letter of credit on the part of the person to whom it is addressed, is contemporaneous with the writing of the letter, and is known to the writer, there no other notice of acceptance of guaranty is necessary to charge him.[2]

§ 168. **When guarantor entitled to notice of default of principal.**—Whether demand of payment must be made of the principal, and notice of his default be given, in order to charge the guarantor, is a question depending very much upon the nature of the particular guaranty. Where the liability of the guarantor is not direct, but is collateral and dependent upon the default of another, notice of such default to such guarantor, within a reasonable time, has been held necessary, where a guaranty of a note was as follows: "I guaranty the payment of the within note to * (A), for value received:"[3] Where a debtor transferred to his creditor certain notes of third persons in payment of his own debt, and promised, if the creditor could not collect the notes, he would pay them:[4] And where an instrument was as follows: "I have this day sold to Kannon a note on Wortham for four hundred and twelve dollars, which I guaranty to said Kannon, waiving all exception of my not assigning said claim, and holding myself bound for the same for value."[5] So, where the holder of a promissory note failed to give the guarantor of the same notice of its non-payment for nine months after its dishonor, and the maker was solvent when the note became due, but afterwards became insolvent, it was held, the guarantor was discharged. The court said: "It is clearly conformable to the general principles of right and justice that the creditor, who knows of the delinquency of his debtor, and withholds information of it from the guarantee, by reason of which the debt

[1] Yancey v. Brown, 3 Sneed (Tenn.) 89.

[2] Wildes v. Savage, 1 Story 22. To similar effect, see Paige v. Parker, 8 Gray, 211.

[3] Cox v. Brown, 6 Jones Law (Nor. Car.) 100. To same effect, see Grice v. Ricks, 3 Dev. Law (Nor. Car.) 62; Ringgold v. Newkirk, 3 Ark. (Pike) 96; Foote v. Brown, 2 McLean, 396; Gamage v. Hutchins, 23 Me. 565.

[4] Adcock v. Fleming, 2 Dev. & Bat. Law (Nor. Car.) 225.

[5] Kannon v. Neely, 10 Hump. (Tenn.) 288. To similar effect, see Sage v. Wilcox, 6 Ct. 81.

is actually lost when it might have been saved by either, should not throw the loss upon the guarantee."[1] The payee of a note sold it, and indorsed a guaranty of its payment upon it. No demand was made on the maker of the note, and he remained solvent for six months after it became due, and afterwards became insolvent. Two years after the note became due, notice of non-payment was given the guarantor, and demand of payment made on him. Held, he was not liable. The court said: "The undertaking of the guarantor of a promissory note is conditional, and he will be discharged by the neglect of the holder to demand payment of the maker, and give the guarantor notice of the non-payment, provided the maker was solvent when the note fell due, and afterwards became insolvent."[2] A party guarantied the punctual payment of two accepted bills. When the bills became due the acceptors were solvent, and so continued for four months, and then became insolvent. No notice was given to the guarantor within the next four years. Held, he was discharged. The court said: "In the case before us, the guaranty was that the acceptances should be promptly met by the acceptors. An agreement in such case to pay at all events, without reference to, or reliance upon the acceptors, could not be inferred. His warranty was that the acceptors would pay as they were bound to do, and not that he himself would pay without regard to whether they did so or not."[3] Where certain parties guarantied the performance of a contract for the purchase of a lot of cattle, and the payment therefor, and for eighteen months after the maturity of the contract, the principal was solvent, but afterwards became insolvent, and no notice of his default was given the guarantors, it was held they were discharged.[4] A guarantor of a promissory note, payable on demand, is discharged from his contract of guaranty, by the omission of the holder to give him notice within a reasonable time of demand on the maker, and non-payment by him, provided the maker was solvent when the guaranty was made, and became insolvent before notice of non-payment was given.[5] In

[1] Oxford Bank v. Haynes, 8 Pick. 423, per Parker, C. J.

[2] Talbot v. Gay, 18 Pick. 534, per Wilde, J. Generally as to when guarantor is entitled to notice of principal's default, see Lowe v. Beckwith, 14 B. Mon. (Ky.) 150.

[3] Globe Bank v. Small, 25 Me. 366, per Whitman, C. J.

[4] Gaff v. Sims, 45 Ind. 262.

[5] Whiton v. Mears 11 Met. (Mass.,) 563; to similar effect, see Nelson v. Bostwick, 5 Hill, 37; Douglass v. Rathbone, 5 Hill, 143.

cases where notice of the principal's default is necessary to charge the guarantor, the same strictness is not required as in the case of indorsers. The notice need not be given immediately upon the principal's default. If it is given within a reasonble time, that is sufficient.[1]

§ 169. **When demand of payment on principal and notice of his default necessary to charge guarantor.**—When the advances are made to the principal on a letter of credit, signed by the guarantor, the weight of authority is that demand of payment must be made on the principal, and notice of his default be given the guarantor within a reasonable time, in order to charge him, unless the principal be insolvent when the debt becomes due. The law upon this subject, and the reasons upon which is founded, have been thus stated: "A demand upon him (the principal), and the failure on his part to perform his engagements, are indispensable to constitute a *casus foederis*. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose, but have a right to insist that the risk of their responsibility shall be fixed and terminated within a reasonable time after the debt has become due."[2] Where O, by an instrument under seal, assigned certain contracts for the payment of money, and covenanted that the sum set opposite each contract, in a schedule annexed to the assignment, was due and would be paid, it was held that O being a guarantor of the amount due on the contracts, in order to maintain a suit against him, it was necessary to aver a previous demand of payment from the persons bound by the contracts. The contracts, having been assigned to the plaintiff, they alone could demand and receive payment, and they must make such demand before coming upon the guarantor.[3] Certain parties entered into a

[1] Bull *v.* Bliss, 30 Vt. 127; Dunbar *v.* Brown, 4 McLean, 166; Talbot *v.* Gay, 18 Pick. 534, and many of the cases cited in this chapter to other points.

[2] Per Story, J. in Douglass *v.* Reynolds, 7 Peters, 113. See, also, McCollum *v.* Cushing, 22 Ark. 540. In Smith *v.* Bainbridge, 6 Blackf. (Ind.) 12, a delay of eighteen months in notifying the guarantor was held to be unreasonable, and to discharge the guarantor.

[3] Mechanics Fire Ins. Co. *v.* Ogden, 1 Wend. 137; *contra*, Barker *v.* Scudder, 56 Mo. 272.

guaranty, in part, as follows: "We hereby engage to see you paid, in due course, for the bill of goods bought by Mr. Ross from you on the 27th inst." A particular bill of goods which had been previously bargained for were delivered on the strength of the guaranty. Held, that this was not an original undertaking, but an undertaking to pay if Ross did not, and that the guarantors were entitled to prompt notice of his default unless he was insolvent.[1] Where a guaranty provided that when a note became due, it should be good and collectible, it was held that it did not bind the guarantor unless diligence was used to collect the note, and the guarantor was notified that it could not be collected. The Court said that, if a party stipulates to do a thing himself, or that another shall do it, he must take notice whether or not it is done. But when he stipulates that the party he contracts with can, by his diligence, do a certain thing, the case is different. "He is not then supposed to know, nor does he assume to know the means taken, or the result. Notice is, therefore, required, for the reason assigned by Judge Swift, that it would be against principle to admit a man to be sued when he has no knowledge of the existence of the demand."[2] A and B each owned an interest in the same land. A transferred his interest to B, and guarantied that if the title proved defective the grantor of the two would recompense B for the loss of the title. Held, that demand on the grantor by B, and notice of his default to A, were necessary before bringing suit against A on the guaranty. Whether A had to pay at all depended upon a contingency, and in order to put him in default it was necessary to demand payment from the grantor, and notify A of his default.[3]

§ 170. **When demand of payment on principal and notice of his default to guarantor not necessary to charge guarantor—Guaranty of promissory note, etc.**—Where the contract of guaranty absolutely and unconditionally provides that the debtor shall pay a given sum at a stated time, no demand of payment on the principal or notice of his default is necessary before suing the guarantor.[4] This principle has been very generally applied to

[1] Mayberry *v.* Bainton, 2 Harrington (Del.) 24.

[2] Sylvester *v.* Downer, 18 Vt. 32, per Royce J. As to the notice necessary to charge a guarantor of collection, see Brackett *v.* Rich, 23 Minn. 485.

[3] Morris *v.* Wadsworth, 17 Wend. 103.

[4] Mann *v.* Eckfords' Exrs. 15 Wend. 502; Peck *v.* Barney, 13 Vt. 93; East River Bank *v.* Rogers, 7 Bosw. (N. Y.) 493; March *v.* Putney, 56 New Hamp.

guaranties of promissory notes.[1] Where a party guarantied the payment of a note if it should not be "duly honored and paid" by the maker, according to its tenor and effect, it was held he was liable on his guaranty if the note was not paid by the maker, even though no demand of payment was made on the maker before suit was brought against him. The court said: "Now it is clear that a request for the payment of a debt is quite immaterial unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request, but the debtor is bound to find out the creditor and pay him the debt when due."[2] The payees of a note indorsed it as follows: "For value received we guaranty the payment of the within note at maturity." Held, "as between them (the guarantors) and the maker of the note, the holder was under no obligation to demand payment of the maker, and on his default to notify the guarantors, for they undertook to pay at all hazards at maturity, the one being as much bound as the other. * Their duty was, and of each of them, on its maturity to go to the holder and take it up. The holder was under no legal or moral obligation to hunt them and make a demand."[3] The same thing was held where the guaranty of a note was as follows: "I guaranty the said note is good, and the payment of the same:"[4] Where the payee of a note indorsed it as follows: "I do assign the within note to * (A) for value received, and guaranty the punctual payment of the same at maturity:"[5] Where the payee of a non-negotiable note indorsed it as follows: "I guaranty the within at maturity:"[6] When a guaranty was in these words: "On the 25th December, 1824, we bind ourselves to see the within note paid:"[7] Where a party wrote on the back of a note, "I hereby guaranty the payment of balance due on note * within sixty days from the second day of May, 1843, balance

34; Bank v. Hammond, 1 Rich. Law (So. Car.) 281; Eneas v. Hoops, 10 Jones & Spen. (N. Y.) 517.

[1] Forest v. Stewart, 14 Ohio St. 246; Williams v. Granger, 4 Day (Conn.) 444; Mallory v. Lyman, 3 Pinney (Wis.) 443; Ten Eyck v. Brown, 3 Pinney (Wis.) 452; Clark v. Merriam, 25 Ct. 576; Levi v. Mendell, 1 Duvall, (Ky.) 77; see, also, Gammell v. Parramore, 58 Ga. 54.

[2] Walton v. Mascall, 13 Mees. & Wels. 452, per Parke, B.

[3] Gage v. Mechanics National Bank of Chicago, 79 Ill. 62, per Breese, J.

[4] Woodstock Bank v. Downer, 27 Vt. 539.

[5] Thrasher v. Ely, 2 Smedes & Marsh. (Miss.) 139.

[6] Peck v. Frink, 10 Iowa, 193.

[7] Taylor v. Ross. 3 Yerg. (Tenn.) 330.

due this day, $292.22:"[1] And where a guaranty on the back of a note was as follows: "I guaranty the payment of the within note to C. Edgerton or order."[2] In the case last referred to, the court said: "Where the guaranty of payment is absolute and unconditional, we are of opinion that it is not necessary, in order to make out a *prima facie* case for recovery, to aver or prove either demand or notice." Moss obligated himself to deliver on a given day, and at a specified place, seventy bushels of salt to Hunter. Hunter transferred this obligation by assignment, and guarantied the payment of the salt as follows: "For value received I assign the within note to * (A) and guaranty the payment of the same." Held, this was an absolute engagement to deliver the salt at the time and place specified, if the maker did not, and demand on the maker and notice to the guarantor were not necessary to charge the guarantor.[3] A memorandum at the foot of a promissory note in these words: "I hereby obligate myself that the above note shall be paid in three years from this 4th day of June, 1838," made in consideration that the payee should delay payment until two years after the maturity of the note, was held to be an original undertaking, which did not require that demand of payment should be made of the maker and notice of his default be given in order to charge the guarantor.[4]

§ 171. **When guarantor bound without notice of default of principal—Other cases.**—The same principle has been applied and notice to the guarantor of the principal's default held not to be necessary in a variety of other cases. Thus, where A agreed to account with B and pay over to him such sum as he should be found to be indebted, and C covenanted that A should perform the agreement, it was held that an action lay against C by B, for the default of A, without previously giving B notice of such default.[5] A contract provided for the return of certain shares of railroad stock which were loaned, and for the payment of interest for their use. At the same time the contract was executed, certain parties guarantied it as follows: "We, the undersigned, guaranty the fulfillment of the above obligation and hereby promise

[1] Cooper *v.* Page, 24 Me. 73.

[2] Clay *v.* Edgerton, 19 Ohio St. 549. per Brinkerhoff, C. J.

[3] Hunter *v.* Dickinson, 10 Humph. (Tenn.) 37.

[4] Reed *v.* Evans, 17 Ohio, 128.

[5] Douglas *v.* Howland, 24 Wend. 35, in which Mr. Justice Cowen delivered an elaborate opinion repudiating the entire doctrine that notice of acceptance of a guaranty is necessary to charge the guarantor.

said Hiram Simons that said stock shall be returned at the time specified, agreeable to the above contract." Held, no demand on the principal or notice of default on his part was necessary to charge the guarantors.[1] A and B being partners, dissolved their partnership, and A agreed to pay the partnership debts, and gave B bond with C as surety, that he would do so. Held, that no notice of A's default in paying the partnership debts was necessary to be given C before B could sue him. The court said: "It is a general rule that where one guaranties the act of another his liability is commensurate with that of his principal and he is no more entitled to notice of the default than the latter. Both must take notice of the whole at their peril."[2] Where a guaranty stated that if the principal did not pay the creditor a certain sum "in three months from this time," the guarantor agreed "to guaranty to said Dickerson the payment of said sum of money." It was held that no notice of the non-payment by the principal was necessary to charge the guarantor.[3] A guaranty stated that if certain merchants would furnish a purchaser goods, the guarantor would "be accountable to you for all his contracts or engagements, as you and he may agree, and in case he does not fulfill them as agreed, I will guaranty the payment thereof." Goods were sold and the guarantor notified thereof. Held, it was not necessary in order to charge him that payment should first be demanded of the principal and notice of his default be given.[4] In April, 1825, the defendant guarantied the payment of money due from his son to the plaintiff upon a sale of timber. The plaintiff received part payment from the son, and made repeated unsuccessful applications to him for the residue till December, 1827, when he became bankrupt. The plaintiff never disclosed to the defendant the result of these applications, but on December 27th, 1827, sued him on his guaranty. Held, the guarantor was liable, on the ground that mere passive delay on the part of the creditor will not discharge the surety.[5]

§ 172. **When no notice of default in payment by principal need be given guarantor of over-due debt, of lease, and of negotiable instrument by separate contract.**—The rule that no notice of the

[1] Simon *v.* Steele, 36 New Hamp. 73.

[2] Gage *v.* Lewis, 68 Ill. 604, per Sheldon, J.

[3] Dickerson *v.* Derrickson, 39 Ill. 574.

[4] Noyes *v.* Nichols, 28 Vt. 159.

[5] Goring *v.* Edmonds, 6 Bing. 94; *Id.* 3 Moore & Payne, 259.

principal's default need be given in order to charge the unconditional guarantor of an existing demand, is specially applicable to a guaranty of a debt made after the debt is due. In such case, the principal is in default when the guaranty is made, and the reasons requiring notice do not apply. Thus H was indebted to R in a certain sum then due and payable, and C, in consideration of an indemnity given by H, and of R's engagement not to sue H for twelve months, promised to pay R the debt at that time, unless the same should have been paid by H. Held, this was an original and absolute undertaking, and no demand on H, or notice of his default was necessary in order to charge C.[1] The same thing has been held in the case of a guaranty of an overdue promissory note, when the guaranty on the back of the note was: "I assign the within note to * (A), and guaranty the payment thereof, for value received:"[2] When a stranger to a note wrote on it, after it was due, "I hereby guarantee the payment of the within note, ninety days from the date of this guaranty:"[3] And when the payee of an overdue note indorsed it as follows, "I assign the within note to * (A), for value received, and guaranty its prompt and full payment."[4] It is not usually necessary, in order to charge the guarantor of rent to come due under a lease, that demand should be made on the principal, and the guarantor be notified of his default. Thus a party, by a writing on the back of a lease running five years, bound himself to pay the lessors "all rents, and damages of every kind they may sustain, by reason of the non-compliance or fulfillment of the stipulations of the within lease by said" lessee. The lessee occupied the premises about half the term, and then left them. About three years after he left, the lessors demanded the rent of the guarantor, and brought suit on the guaranty, but they had before given the guarantor no notice of the default of the lessee. Held, the guaranty was an absolute undertaking, and the guarantor was liable.[5] In an action against the guarantor of rent already due,

[1] Read v. Cutts, 7 Greenl. (Me.) 186.

[2] Foster v. Tolleson, 13 Rich. Law & Eq. (So. Car.) 31; *contra*, Benton v. Gibson, 1 Hill (So. Car.) 56.

[3] Sabin v. Harris, 12 Iowa, 87.

[4] Wright v. Dyer, 48 Mo. 525; to same effect, see Lane v. Levillian, 4 Ark. (Pike), 76.

[5] Voltz v. Harris, 40 Ill. 155; explaining and modifying, White v. Walker, 31 Ill. 422. To same effect, see Ducker v. Rapp, 9 Jones & Spencer (N.Y.) 235; Turnure v. Hohenthal, 4 Jones & Spencer (N.Y.) 79; *contra*, Virden v. Ellsworth, 15 Ind. 144.

and to become due for a certain time, from a tenant at will, it has been held that it is not necessary to prove a demand of payment on the tenant, and notice of the non-payment to the guarantor, unless the terms of the guaranty, or the nature and circumstances of the particular case require it. The court in an able opinion, which presents a clear view of the law on this point, said: "The subject of the guaranty was the payment of certain sums at certain times, both absolute, and fixed by the terms of the guaranty itself. It required no act of the plaintiff to precede the performance by Bailey (principal), except the permission for Bailey to remain, which the defendant knew had been given. If Bailey made a corresponding agreement to do what the defendant agreed he should do, it was broken by the mere fact of non-payment, without demand upon him. The same fact was of itself a breach of the defendant's contract of guaranty. A formal demand upon Bailey is not necessary to make his failure to pay the rent a breach of his obligation, and the defendant's contract is simply that Bailey shall perform his agreement. But whether Bailey made such a corresponding agreement or not, the defendant, by his guaranty, undertook that Bailey should perform certain specific acts, and he is liable on his agreement for Bailey's failure to do those acts. * In a suit against a guarantor it is undoubtedly necessary to allege and prove a breach of the contract of guaranty, but it is only necessary to show such acts as would constitute a breach of the particular contract in suit. If the guaranty be for the performance of a specific act of another, and be absolute in terms, whatever is sufficient to show default in that other person, will ordinarily show a breach of the contract of guaranty, and a right of action upon it."[1] One who is not a party to a negotiable instrument, but guaranties its payment by a separate contract, is not discharged by want of demand on the principal and notice of dishonor to the guarantor, unless the guarantor is injured thereby.[2]

§ 173. **If principal be insolvent when debt becomes due, no**

[1] Vinal *v*. Richardson, 13 Allen, 521; disapproving, Ilsley *v*. Jones, 12 Gray, 260.

[2] Hitchcock *v*. Humfrey, 5 Man. & Gr. 559; *Id*. 6 Scott (N. R.) 540; Lewis *v*. Brewster, 2 McLean, 21; Hank *v*. Crittenden, 2 McLean, 557; Holbrow *v*. Wilkins, 1 Barn. & Cress. 10; *Id*. 2 Dow. & Ry. 59; Reynolds *v*. Douglass, 12 Peters, 497; Rhett *v*. Poe, 2 How. (U. S.) 457; Walton *v*. Mascall, 13 Mees. & Wels. 72; Gasquet *v*. Thorn, 14 La. (Curry) 506; *contra*, Philips *v*. Astling, 2 Taunt. 206.

demand on him, nor notice of his default to guarantor necessary. —If the principal debtor be insolvent when the debt becomes due, and afterwards so remain, no demand need be made on him, or notice of his default be given the guarantor, in most cases, where it would otherwise be necessary, unless some loss or damage can be shown to have occurred to the guarantor in consequence; and he will only be discharged to the extent that he is injured.[1] Delay and damage must both concur to discharged the guarantor.[2] In this respect a gaurantor differs from an endorser of a negotiable instrument, for while an indorser must be at once notified, independent of all considerations, it is otherwise with a guarantor.[3] With reference to this subject, it has been said that guarantors "insure, as it were, the solvency of their principals, and, therefore, if the latter become bankrupt and notoriously insolvent, it is the same thing as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them."[4] Another court has clearly and correctly expressed the law on this subject, as follows: "The guarantor is entitled to notice, but cannot defend himself for want of it, unless the notice has been so long delayed as to raise a presumption of payment, or waiver, or, unless he can show that he has lost, by the delay, opportunities for obtaining securities, which a notice, or an earlier notice, would have secured him. * If the notice be delayed for a very short time, but by reason of the delay the guarantor loses the opportunity of obtaining indemnity, and is irreparably damaged, he would be discharged from his obligation. But if the delay were for a long period, and it was nevertheless clear that the guarantor would have derived no benefit from an earlier notice, the delay would not impair his obligation."[5] When the guaranty is such from its terms, or oth-

[1] Louisville Manf. Co. *v.* Welch, 10 How. (U. S.) 461; Johnson *v.* Wilmarth, 13 Met. (Mass.) 416; Bank *v.* Knotts, 10 Rich. Law (So. Car.) 543; Leech *v.* Hill, 4 Watts (Pa.) 448; Skofield *v.* Haley, 22 Me. 164; Beebe *v.* Dudley, 26 New Hamp. 249; Farmers & Mechanics Bank *v.* Kercheval, 2 Mich. 504; Union Bank *v.* Coster's Exr. 3 New York, 203; Wolfe *v.* Brown, 5 Ohio St. 304; Reynolds *v.* Douglass, 12 Peters, 497; Gillighan *v.* Boardman, 29 Me. 79; Bashford *v.* Shaw, 4 Ohio St. 264; Voltz *v.* Harris, 40 Ill. 155; Fear *v.* Dunlap, 1 Greene (Iowa) 331; Fuller *v.* Scott, 8 Kansas, 25; Wildes *v.* Savage, 1 Story, 22. To the same effect, see many other cases cited in this chapter and other points.

[2] Woodson *v.* Moody, 4 Humph. (Tenn.) 303.

[3] Gibbs *v.* Cannon, 9 Serg. & Rawle (Pa.) 198; Overton *v.* Tracey, 14 Serg. & Rawle (Pa.) 311.

[4] March *v.* Putney, 56 New Hamp. 34, per Stanley, J.

[5] Second National Bank *v.* Gaylord, 34 Iowa, 246, per Day, J.

erwise, that notice is necessary to put the guarantor in default, such notice may, if the principal be insolvent when the debt becomes due and so remain, be given at any time before suit brought, and the same diligence is not required as in cases where the principal is solvent when the debt becomes due. The insolvency of the principal has a controlling influence on the question of the reasonable time in which notice should be given.[1]

§ 174. **What is the reasonable time within which notice must be given—Pleading.**—No general rule can be laid down as to the time within which notice of the acceptance of the guaranty, or of the default of the principal, must be given the guarantor when such notice is necessary. All that can be said is, that the notice must be given within a reasonable time, all the circumstances of each particular case being considered.[2] What is such reasonable time has been held to be a question of law,[3] especially where there is no dispute about the facts.[4] This question can very seldom, however, be resolved into a mere question of law, to be decided by the court, but must generally be a mixed question of law and fact, to be determined by the jury under proper instructions by the court.[5] It has been held that in determining whether notice of the acceptance of a continuing guaranty has been given within a reasonable time, reference must be had to the time of the acceptance of the guaranty, and not to the last sale under it.[6] Where a guaranty was a continuing one for certain drafts to be accepted, it was held, that if the course of dealing between the parties was sufficient to justify a finding that the guarantor had notice of acceptance, it might be inferred that notice accompanied each transaction. The guaranty being continuous, the notice would be continuous also.[7] When notice of default in payment on the part of the principal is necessary to

[1] Salem Manf. Co. v. Brower, 4 Jones Law (Nor. Car.) 429; Protection Ins. Co. v. Davis, 5 Allen, 54; Paige v. Parker, 8 Gray, 211; Salisbury v. Hale, 12 Pick. 416. See, also, on this subject, Reynolds v. Edney, 8 Jones Law (Nor. Car.) 406.

[2] Montgomery v. Kellogg, 43 Miss. 486; Howe v. Nickels, 22 Me. 175.

[3] Salem Manf. Co. v. Brower, 4 Jones Law (Nor Car.) 429, Craft v. Isham, 13 Ct. 28.

[4] Seaver v. Bradley, 6 Greenl. (Me.) 60.

[5] Lowry v. Adams, 22 Vt. 160; Louisville Manf. Co. v. Welch, 10 How. (U. S.) 461; Wadsworth v. Allen, 8 Gratt. (Va.) 174; Seaver v. Bradley, 6 Greenl. (Me.) 60.

[6] Mussey v. Rayner, 22 Pick. 223.

[7] First National Bank of Dubuque v. Carpenter, 41 Iowa, 518.

charge the guarantor, the declaration should aver the notice; but a general statement of notice, as "of which premises the defendant had due notice," is sufficient.[1] If notice is alleged in the declaration when it is not necessary, in order to charge the guarantor, the allegation may be treated as surplussage, and need not be proved.[2]

§ 175. **How notice may be proved—What amounts to waiver of it.**—When notice to the guarantor is necessary in order to charge him, such notice need not be proved by direct evidence, but may be inferred from circumstances.[3] The notice need not be in writing nor in any particular form.[4] It may be given by letter.[5] It need not be given by the creditor. If knowledge is brought to the guarantor in any manner he can protect himself.[6] It may be inferred from what took place at the time of giving the guaranty, subsequent casual conversations of the guarantor with third persons, and his conduct and remarks in reference to the collection of the demand of the person for whose benefit the guaranty was given.[7] It is sufficient if the notice is given by the person for whom the guarantor became holden.[8] Notice of "about the amount" of goods furnished under a guaranty is sufficient.[9] It has been held, that notice was sufficiently shown by the fact that the guarantor and the principal were close neighbors and relatives, and that the guarantor took other steps to further the credit of the principal with the creditor, and knew of advances made by the creditor to the principal.[10] Where a father-in-law lived just across the street from his son-in-law, and frequently passed his store, and dealt with him occasionally, it was held, these facts did not constitute notice to the father-in-law of the acceptance of a guaranty for goods to be sold the son-in-law.[11] The fact that the principal and guarantor were relatives, and had been partners, has been given weight, and with other cir-

[1] Lewis *v.* Brewster, 2 McLean, 21; Oaks *v.* Weller, 16 Vt. 63.

[2] Gibbs *v.* Cannon, 9 Serg. & Rawle (Pa.) 198.

[3] Rankin *v.* Childs, 9 Mo. 665; Lawton *v.* Maner, 9 Rich. Law (So. Car.) 335.

[4] Reynolds *v.* Douglass, 12 Peters, 497.

[5] Dole *v.* Young, 24 Pick. 250.

[6] Griffin *v.* Rembert, 2 Rich. Law N. S. (So. Car.) 410; Oaks *v.* Weller, 16 Vt. 63.

[7] Woodstock Bank *v.* Downer, 27 Vt. 539.

[8] Oaks *v.* Weller, 16 Vt. 63; Noyes *v.* Nichols, 28 Vt. 159.

[9] Noyes *v.* Nichols, 28 Vt. 159; but see Spencer *v.* Carter, 4 Jones Law (Nor. Car.) 287.

[10] Menard *v.* Scudder, 7 La. An. 385.

[11] Craft *v.* Isham, 13 Ct. 28.

cumstances held to be sufficient evidence of notice to the guarantor.[1] An acknowledgment by the guarantor of his liability and a promise to pay, supersedes the necessity of any further evidence of notice of the acceptance of the guaranty;[2] and of default of the principal.[3] Where the guaranty expressly waives demand and notice, the guarantor is liable to an action thereon without previous demand or notice;[4] and in such case the guaranty cannot be contradicted by oral evidence of a contemporaneous agreement to collect the note from the principal, and of laches in pursuing him.[5] The guarantor cannot complain of want of notice of acceptance of the guaranty, when his acts and declarations amount to a waiver of such notice.[6]

[1] Lowry v. Adams, 22 Vt. 160.
[2] Peck v. Barney, 13 Vt. 93.
[3] Breed v. Hillhouse, 7 Ct. 523.
[4] Bickford v. Gibbs, 8 Cush. 154.
[5] Worcester Co. Institution v. Davis, 13 Gray, 531.
[6] Trefethen v. Locke, 16 La. An. 19

CHAPTER IX.

OF THE RIGHTS OF THE SURETY OR GUARANTOR AGAINST THE PRINCIPAL.

§ 176. **Promise by principal to indemnify surety implied —When cause of action accrues to surety.**—Upon payment by the surety or guarantor of the debt for which he is bound, the same being then due, a right of action for reimbursement immediately arises in his favor and against the principal. In the absence of an express agreement the law implies a promise of indemnity on the part of the principal. If the debt is due, the right of action on this implied promise accrues to the surety or guarantor at the time he pays the debt, or a part of it, and not before.[1] Consequently a surety cannot commence an attachment suit against his principal before the note he has signed is due, and before he has paid it, under the provision of a statute allowing an attachment to be brought in certain cases where "nothing but time is wanting to fix an absolute indebtedness." Here something besides time is wanting, for the principal may pay the debt when due and the surety never be damnified.[2] Judgment was obtained against a surety on a note, which he paid. The amount of the note was within the jurisdiction of a justice of the peace, but the amount of the judgment, and which was paid, was not. Held, the surety could not sue for indemnity before a justice, as his cause of action arose upon payment of the judgment and was for the amount paid.[3] A surety who had not paid the debt for which he had become bound, had effects of the principal in his hands which had not been left with him for his indemnity. He was summoned as garnishee of the principal, and it was held that he was liable even though he was afterwards sued for, and obliged to pay, the debt of the principal. He had no right of action against the principal when summoned as garnishee.[4] If the surety takes a bond of

[1] Pigou v. French, 1 Washington, (U. S.) 278; Ford v. Stobridge, Nelson 24; Forest v. Shores, 11 La. (Curry) 416.

[2] Dennison v. Soper, 33 Iowa, 183.

[3] Blake v. Downey, 51 Mo. 437.

[4] Ingalls v. Dennett, 6 Greenl. (Me.) 79.

indemnity from the principal, it has been held that he cannot upon paying the debt sue the principal upon an implied promise, but is confined to his remedy on the bond upon the ground that "Promises in law only exist where there is no express stipulation."[1] But it has been held that where a surety takes security for his indemnity from a stranger, the presumption is that it is cumulative, and the implied obligation of the principal to indemnify the surety is not waived or merged.[2] The implied promise of indemnity arises in favor of the surety, who pays the debt without suit against him.[3] The surety may without the request of the principal, pay the debt before it is due, and after it is due sue the principal for indemnity. In such case the cause of action accrues to the surety at the time the debt becomes due.[4] With reference to this matter, an eminent judge has said: "Why may not a surety take measures of precaution against loss from a change in the circumstances of his principal, and accept terms of compromise before the day which may not be attainable after it? He may ultimately have to bear the burden of the debt, and may therefore provide for the contingency by reducing the weight of it. Nor is he bound to subject himself to the risk of an action by waiting till the creditor has a cause of action. He may, in short, consult his own safety, and resort to any measure calculated to assure him of it, which does not involve a wanton sacrifice of the interests of his principal."[5]

§ 177. **Surety may pay by instalments, and sue principal for every instalment — Implied contract of indemnity arises when surety becomes bound.**—When the debt becomes due the surety may pay a part of it, and immediately sue the principal for the amount so paid. If he pays different parts at different times, he may sue the principal for each part when he pays it. This is not making several claims of one, because the debt due the creditor is not the surety's cause of action. His cause of action is the payment which he has made for the principal, and it is complete the instant he makes the payment.[6] "However convenient

[1] Toussaint v. Martinnant, 2 Durn. & East, 100, per Buller, J.

[2] Wesley Church v. Moore, 10 Pa. St. 273.

[3] Mauri v. Heffernan, 13 Johns. 58.

[4] White v. Miller, 47 Ind. 385; Tillotson v. Rose, 11 Met. (Mass.) 299.

[5] Gibson, C. J., in Craig v. Craig, 5 Rawle (Pa.) 91.

[6] Bullock v. Campbell, 9 Gill (Md.) 182; Williams, Admr. v. Williams' Admr. 5 Ohio, 444; Pickett v. Bates, 3 La. An. 627.

it might be to limit the number of actions in respect of one suretyship, there is no rule of law which requires the surety to pay the whole debt before he can call for reimbursement."[1] A surety paid the creditor part of the amount due on a note with a view of reducing it within the jurisdiction of a justice of the peace, and sued the principal for the sum so paid. Held, that as he was bound for the debt, he had a right to make a partial payment and recover the amount paid without regard to the intent with which the payment was made.[2] Although the surety cannot, in the absence of express contract, sue the principal for indemnity before he actually pays the debt, yet the implied contract for indemnity arises immediately upon the surety becoming bound. The law upon this point has been thus stated: "It is clear that the contract of a principal with his surety to indemnify him, for any payment which the latter may make to the creditor, in consequence of the liability assumed, takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety."[3] This was held in a case where the question was whether the principal was entitled to a homestead. The same principle was held where a voluntary conveyance was made by the principal after the surety became bound, but before he paid the debt, and the conveyance was set aside at the suit of the surety.[4] A was indebted to B in $100, but he was surety for B for $500. B conveyed all his accounts to an assignee, before A paid anything on account of his suretyship; afterwards A paid the amount for which he was liable as surety. Held, the assignee could recover nothing from A. The court said: "We think there exists in a surety, an equity from the time of his assuming the relation, by virtue of the implied undertaking on the part of the principal to see him indemnified, and that although no prefect right of action accrues

[1] Davies v. Humphreys, 6 Mees. & Wels. 153, per Parke, B.

[2] Hall v. Hall, 10 Humph. (Tenn.) 352.

[3] Per Bigelow, J., in Rice v. Southgate, 16 Gray, 142.

[4] Choteau v. Jones, 11 Ill. 300.

until actual payment, still such payment has such reference to the original undertaking of suretyship, that it overrides any equities of a subsequent date."[1]

§ 178. **Surety who pays the debt may sue principal in assumpsit, and is entitled to full indemnity from all or any one of the principals.**—The surety or guarantor who has paid the debt of the principal, may maintain an action of assumpsit against the principal for money paid at his request.[2] It has been held, that if the surety in any way (as by his land being sold on execution) extinguishes, or pays the debt of the principal, it is, so far as the principal is concerned, equivalent to paying money for his benefit and at his request, and the surety may maintain general assumpsit against the principal for money paid.[3] The surety cannot recover indemnity from the principal by an action in tort.[4] If one of several joint guarantors pays the debt for which all are bound, he has thereby a separate right of action against the principal.[5] The law implies a several assumpsit by the principal to reimburse the surety who pays the debt, and, therefore, if the surety who pays the debt releases his co-surety from all claim for contribution, such release does not affect his claim for indemnity against the principal.[6] Unless there is an express agreement to the contrary, the surety is entitled to claim indemnity from all his principals. Thus certain parties, being appointed executors of a will, part of them made a joint bond as such, and a surety also signed the bond. Afterwards A, another of the executors, signed the bond. There was but the one surety, and, when he signed the bond, he stated that he signed it as surety for B, one of the executors, and wished the other executors to get different bondsmen. B was guilty of a default and died, and afterwards judgment was recovered on the bond against the surviving executors, including A, and also against the surety. The surety paid the judgment, and sued all the surviving executors for in-

[1] Barney v. Grover, 28 Vt. 391, per Redfield, C. J.; see, also, Morrow v. Morrow, 2 Tenn. Ch. R. (Cooper) 549; Loughridge v. Bowland, 52 Miss. 546.

[2] Morrice v. Redwyn, 2 Barnardiston, 26; Davies v. Humphreys, 6 Mees. & Wels. 153; Ford v. Keith, 1 Mass. 139; Exall v. Partridge, 8 Durn. & East, 308; Warrington v. Furbor, 8 East. 242.

[3] Hulett v. Soullard, 26 Vt. 295.

[4] Ledbetter v. Torney, 11 Iredell Law (Nor. Car.) 294.

[5] Lowry v. Lumbermen's Bank, 2 Watts & Serg. (Pa.) 210.

[6] Crowdus v. Shelby, 6 J. J. Marsh, (Ky.) 61.

demnity. Held, that A, by signing the bond subsequent to the time the surety signed, recognized the surety as his surety, and this was equivalent to a previous request, and that A and all the surviving executors were liable for the indemnity of the surety.[1] If the surety is bound for several principals, he is entitled to recover from any one of them the whole of what he has paid. Each of the principals is debtor for the whole of the debt to the creditor, and the surety, being liable for each of them, has, by paying the debt, freed each of them from the creditors' claim for the whole, and consequently has a right to recover the whole amount from any one of them.[2] He may recover the whole amount from the surviving one of two principals,[3] or from the estate of a deceased principal where there are several surviving principals.[4]

§ 179. **When joint sureties can, and when they cannot, maintain joint suit for indemnity.**—If there are several sureties for the same debt, and each pays a portion of it from his individual money, they cannot join in a suit against the principal for the money so paid.[5] Where, however, the payment is made by several sureties from a joint fund, they may join in an action against the principal. Thus, two sureties who were jointly liable as such for a debt, borrowed money to pay a portion of it, for which they gave their joint note, and to pay the balance they gave their joint note to the creditor, who accepted it as payment. Held, they might properly bring a joint suit for indemnity against the principal.[6] Three parties having jointly guarantied a debt and received back a mortgage of indemnity, two of them paid the debt, and they all joined in a bill to foreclose the mortgage. Held, they might properly do so.[7] A judgment was rendered against several persons as heirs of a surety, and they gave a surety

[1] Babcock v. Hubbard, 2 Ct. 536.

[2] Apgar's Admrs. v. Hiler, 4 Zabr. (N. J.) 812; Dickey v. Rogers, 19 Martin (La.) 7 N. S. 588; Bunce v. Bunce, Kirby (Ct.) 137.

[3] Riddle v. Bowman, 27 New Hamp. 236.

[4] West v. Bank of Rutland, 19 Vt. 403.

[5] Sevier v. Roddie, 51 Mo. 580; Parker v. Leek, 1 Stew. (Ala.) 523; Appleton v. Bascom, 3 Met. (Mass.) 169; Peabody v. Chapman, 20 New Hamp. 418; Bunker v. Tufts, 55 Me. 180.

[6] Pearson v. Parker, 3 New Hamp. 366; to same effect, see Whipple v. Briggs, 28 Vt. 65.

[7] Dye v. Mann, 10 Mich. 291. Holding that sureties who have paid for the default of a tax collector, and been authorized by statute to bring suits for their indemnity against persons owing taxes, may join in such suits; see Prather v. Johnson, 3 Harr. & Johns. (Md.) 487.

for a stay of execution, but afterwards paid the judgment. Held, they might jointly sue the principal for indemnity. "Their liability arose upon the fact that we must presume that his (the ancestor's) estate came into their hands; otherwise they would not have been responsible. It was their joint debt, then, as heirs," and having made payment jointly they were entitled to join in a suit for indemnity.[1] Where several individuals, acting as partners, and in their partnership name, became sureties for another partnership, and after the dissolution of both partnerships, were called upon to pay, and jointly paid the amount for which they were so liable, it was held that they might maintain a joint action for indemnity.[2] B and G were joint sureties, and B died. His executor was a partner in business with G, and the two partners paid the debt out of their joint funds as partners. Held, they could not join in a suit for indemnity. They were not joint sureties, nor was the money paid for a partnership debt. Having made the payment on a matter foreign to their partnership concerns, it operated as a severance of their joint interest in the money paid.[3]

§ 180. **Surety who has not been requested to become such cannot recover indemnity—Surety who pays may immediately sue principal without demand or notice.**—A surety cannot ordinarily recover indemnity from the principal, unless he became surety at the request of the principal, either express or implied.[4] After a bond had been executed by principal and surety, another person, at the instance of the holder, but without the knowlege or consent of the maker, guarantied the bond by indorsing on it as follows: "This is a good bond." He was compelled to pay the bond, and sued the original surety for indemnity. Held, he was not entitled to recover, because he was not an indorser in the usual sense of that term, and he had not been requested to be-become surety by the party he sought to charge.[5] A and B were principals and C and D sureties in a bond. Before signing, it was agreed that C should be the surety of A, and D the surety of B, but this did not appear from the instru ment. C and D each paid one-half of the debt, and A indemni-

[1] Snider v. Greathouse, 16 Ark. 72.
[2] Day v. Swann, 13 Me. 165.
[3] Gould v. Gould, 8 Cowen, 168.
[4] Exrs. of White v. White, 30 Vt. 338; McPherson v. Meek, 30 Mo. 345.
[5] Carter v. Black, 4 Dev. & Bat. Law (Nor. Car.) 425.

fied C. Afterwards D sued A and B for indemnity. Held, he could not recover anything from A. The court said: "The obligation of principals to reimburse to securities the money paid by them, is not founded on the bonds, which securities give for their principals, but on the express contracts of indemnity, which the parties make, or upon the implied promise raised by the law upon the payment of money for another at his request."[1] Where the surety of a surety pays the debt of the principal under a legal obligation, from which the principal was bound to relieve him, such payment is a sufficient consideration to raise an implied assumpsit on the part of the principal to repay the amount, although the payment was made without a request from the principal.[2] A request may be inferred from circumstances: Thus, a party signed an appeal bond, from a judgment by a justice of the peace, as surety for appellants, who appeared in the appellate court and defended the suit, and were beaten, and the surety had to pay a portion of the judgment. Held, that from the fact that the principal appeared and defended in the appellate court, a request to the surety to become such would be inferred.[3] A surety who has paid the debt of the principal may at once, without notice to him, or making any demand of indemnity, sue him for reimbursement. The contract of indemnity "is supposed to arise at the moment when the surety contracts his obligation ; and it is broken the moment when the surety is damnified." It is the duty of the principal to take notice of the fact that the surety has been damnified.[4]

§ 181. **Surety who pays the debt with his own note or property may at once sue the principal for indemnity.**—The surety who, in satisfaction of the debt of the principal, gives his own note, which the creditor receives as payment of the debt, may immediately, and before paying the note given by him, sue the principal for indemnity.[5] A surety gave his note for the debt of the principal, which was accepted by the creditor as payment. The surety never paid the note, became insolvent, and afterwards

[1] Hill *v.* Wright, 23 Ark. 530, per Fairchild, J.

[2] Hall *v.* Smith, 5 Howard (U. S.) 96,

[3] Snell *v.* Warner, 63 Ill. 176.

[4] Ward *v.* Henry, 5 Ct. 595 per Bristol, J.; Thompson *v.* Wilson's Exr. 13 La. (Curry) 138; Collins *v.* Boyd, 14 Ala. 505; Sikes *v.* Quick, 7 Jones Law (Nor. Car.) 19; on same subject, see Warrington *v.* Furbor, 8 East, 242.

[5] Doolittle *v.* Dwight, 2 Met. (Mass.) 561; Bone *v.* Torrey, 16 Ark. 83; Mims *v.* McDowell, 4 Ga. 182; Pearson *v.* Parker, 3 New Hamp. 366; Elwood *v.* Deifendorf, 5 Barb. (N.Y.) 398; Witherly *v.* Mann, 11 Johns. 518; White *v.* Miller, 47 Ind. 385; Hommell *v.* Gamse-

sued the principal for money paid. Held, he was entitled to recover. The court clearly stated the law on this subject, and the reasons for it thus: "Anything which the party paying and the party receiving think proper to regard as money, must generally be so regarded in a court of justice. Property delivered and accepted as money, may be so considered. * Bank bills, which are nothing but the promissory notes of a corporation, are in all the affairs of life, and in all the courts, regarded as money. A payment of the debt of a third person, at his request, in bank bills, would sustain an action for money paid, laid out and expended. * If a surety discharges the debt of his principal by his own note, which is accepted as payment, is it not as much money paid, laid out and expended, as if he had paid it in the notes of a bank?"[1] Where the land of the surety has been levied on, to satisfy the debt of the principal, and has been applied to that purpose, the surety may recover indemnity in an action for money paid.[2] A judgment was rendered against principal and surety, which was replevied (stayed) by the surety alone. The legal effect of the replevin was to extinguish the judgment. Held, the surety might at once sue the principal for indemnity without paying the amount due on the replevin bond.[3] A principal being indebted for rent, he and the creditor and a surety met, and the surety gave the creditor a mortgage on his property for an extended time to secure the debt, and the creditor released the principal, and received the mortgage in full payment of the debt. Held, the surety might sue the principal for money paid before paying the mortgage.[4] It has been held that the possession of a note by the surety, which was signed by him and the principal, was *prima facie* evidence that he had paid it.[5] But it seems that in order to have this effect it must also be shown that the note had been delivered to the payees, and was at one time their property.[6]

well, 5 Blackf. (Ind.) 5; *contra*, where the note given by the surety was non-negotiable, Pitzer *v.* Harmon, 8 Blackf. (Ind.) 112; Bennett *v.* Buchanan, 3 Ind. 47.

[1] Peters *v.* Barnhill, 1 Hill Law (So. Car.) 237, per O'Neall, J.

[2] Lord *v.* Staples, 23 New Hamp. 448; Bonney *v.* Seely, 2 Wend. 481.

[3] Burns *v.* Parish, 3 B. Mon. (Ky.) 8.

[4] McVicar *v.* Royce, 17 Up. Can. Q. B. R. 529. To the effect that the surety cannot sue the principal for money paid when he has made payment by his bond, see Boulware *v.* Robinson, 8 Texas, 327; Morrison *v.* Berkey, 7 Serg. & Rawle (Pa.) 238.

[5] Reynolds *v.* Skelton, 2 Texas, 516.

[6] Landrum *v.* Brookshire, 1 Stewart (Ala.) 252.

§ 182. **Surety, who extinguishes the debt for less than the full amount, can only recover from principal the value of what he paid.**—If the surety extinguishes the debt of the principal for any sum less than the full amount thereof, he can, in the absence of express contract, only recover from the principal the amount paid by him,[1] and interest thereon.[2] The implied contract is, that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal. If he pays in depreciated bank notes, or other money which is below par, but is taken by the creditor at par, he can only recover from the principal the par value of such money.[3] If he pays in land he can only recover the value of the land. "He is entitled to recover the amount paid, not the amount extinguished by that payment."[4] A surety paid the debt of his principal to a bank, a small portion in bills of the bank, and the balance by his note to the bank. During all that time, the notes of the bank were worth only fifty cents on the dollar, but the bank received them at par for debts due it. Held, that as the bank had received the note of the surety as payment of the debt, he might, before paying the note, sue the principal for indemnity, but could only recover fifty per cent. of the amount of the note and the actual value of the money he had paid, that being the extent of his damage.[5] If the surety, who compounds a debt for which his principal and himself have become jointly liable, takes an assignment of the debt to a trustee for himself, he can only claim against his principal the amount which he has paid. He occupies in that regard, the same position as an agent, and cannot speculate out of his principal. "It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrange-

[1] Eaton *v.* Lambert, 1 Nebraska, 339; Pickett *v.* Bates, 3 La. An. 627; Coggeshall *v.* Ruggles, 62 Ill. 401; Crozier *v.* Grayson, 4 J. J. Marsh (Ky.) 514; Blow *v.* Maynard, 2 Leigh (Va.) 29.

[2] Hicks *v.* Bailey, 16 Tex. 229; Miles *v.* Bacon, 4 J. J. Marsh (Ky.) 457.

[3] Kendrick *v.* Forney, 22 Gratt, (Va.) 748; Miles *v.* Bacon, 4, J. J. Marsh (Ky.) 457; Hall's Admr. *v.* Creswell, 12, Gill & Johns. (Md.) 36; Crozier *v.* Grayson, 4 J. J. Marsh, (Ky.) 514; Butler *v.* Butler's Admr. 8 West Va. 674; Feamster *v.* Withrow, 9 West Va. 296.

[4] Bonney *v.* Seely, 2 Wend. 481, per Savage, C. J.

[5] Jordan Admr. *v.* Adams, 7 Ark. (2 Eng.) 348.

ment with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting."[1]

§ 183. **Surety can only recover from principal the amount paid, and not consequential or indirect damages.**—In the absence of an express agreement to the contrary, a surety who has paid the debt of his principal can only recover from the principal the amount paid by him. He cannot recover anything for what he has been obliged to sacrifice, by selling his property for less than its value, nor for any incidental loss. "To these disadvantages he voluntarily exposes himself when he becomes surety, and the law affords him no relief against his principal for these consequential damages. * To establish a different rule would create endless confusion, collusion, combination and fraud."[2] He cannot, when he has not paid the debt, but has been discharged under an insolvent act, recover from the principal damages which he has suffered by being imprisoned on account of the debt.[3] He may agree with his principal upon a certain price for the use of his credit, but unless there is a special agreement, he can recover nothing for it. It has been held that where there is an express agreement that something shall be paid, nothing can be recovered unless the sum to be paid is fixed by the agreement.[4] A party became surety in a duty bond to the United States, which was captured in time of war by the English, and by them a capias was issued against the obligors in the bond. The surety fled, to avoid being arrested, and thereby his business was broken up, and he was put to great expense, and not having paid the bond, he sued certain parties for indemnity, who had agreed to save him harmless. Held, he was not entitled to recover. The court said that if a surety is broken up by paying the debt of his principal, he cannot recover for such consequential damages. "Flight to avoid payment of the debt, is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon his surety's ability to pay,

[1] Reed *v.* Norris, 2 Mylne & Craig, 361, per Lord Cottenham, C.; *contra*, Blow *v.* Maynard, 2 Leigh (Va.) 29, where it is said that there is nothing in the relation of principal and surety which will prevent the surety from buying the claim against the principal, and taking an assignment of it and holding it for the full amount, the same as a stranger might.

[2] Vance *v.* Lancaster, 3 Haywood, (Tenn) 130, per Roane, J.

[3] Powell *v.* Smith, 8 Johns. 249.

[4] Perrine *v.* Hotchkiss, 58 Barb. (N. Y.) 77.

and did not stipulate to save him harmless from anything but the payment of money.'"[1]

§ 184. **Effect of judgment against surety on liability of principal for indemnity—Notice—Statute of Limitations, etc.**—The surety on a note, who, without knowing of a defense, has let judgment go against him by default, and has paid the judgment, may recover indemnity from the principal, notwithstanding the fact that the principal who was sued at the same court in another suit, by defending the same, obtained a judgment in his favor. "To the suggestion that the surety might have resisted and defeated the recovery, he may reply that he was a stranger to the consideration of the note, and was privy to nothing more than the terms of an absolute obligation, which he bound himself to make good, if not punctually fulfilled. But if he had been made privy to the principal's defense, then he might have lost his right to redress."[2] So, where principal and surety were sued on a note, and the signature of the principal not being proved on the trial, judgment was had against the surety alone, which he paid, it was held that he might recover indemnity from the principal.[3] If the principal has notice of the suit against his surety, he is bound by the result of the litigation, and a foreign judgment has the same effect in this regard, as one of the courts in which the suit for indemnity is brought.[4] In such case, the principal cannot complain that the suit was unskillfully defended by the surety.[5] The fact that when a surety is sued, he fails to notify his principal of such suit, will not preclude him from recovering indemnity.[6] If the surety on a bond which ought probably to have been avoided on the ground of illegality in the consideration, has made a reasonable defense in a suit brought on the bond, and has been defeated and paid the judgment, he may recover indemnity from the principal.[7] A surety sued in one state on a warranty of a slave there made, may in another state recover against his principal, who had notice of the pendency of such suit, whatever is legally adjudged against the surety by

[1] Hayden v. Cabot, 17 Mass. 169 per Parker, C. J.

[2] Stinson v. Brennan, Cheves Law (So. Car.) 15, per Butler, J.

[3] Peters v. Barnhill, 1 Hill Law (So. Car.) 234.

[4] Konitzky v. Meyer, 49 New York, 571. See, also, on this subject, Hare v. Grant, 77 Nor. Car. 203.

[5] Rice v. Rice, 14 B. Mon. (Ky.) 335.

[6] Williams v. Greer, 4 Haywood (Tenn.) 235.

[7] Montgomery v. Russell, 10 La. (Curry) 330.

the laws of the state in which the suit against him was brought.[1] The administratrix of a surety was sued for the debt of the principal after it was barred by the statute of limitations as to the estate of the surety, but before it was barred by the statute as against the principal. Instead of pleading the statute, she submitted the matter to referees, who awarded that she should pay the debt, which she did. Held, the principal was liable to reimburse the money so paid. The principal was liable to pay the debt, and it made no difference to him that the surety had done so, without insisting on the bar of the statute.[2] But where a party was surety for another in a bond replevying an execution, and by statute in such case, if an execution was not issued by the creditor within one year after he had a right to issue it, the surety was discharged, and execution was not so issued, and the surety, after he was discharged by the terms of the law, paid the debt, without having it assigned to him, it was held he could not recover indemnity from the principal. As he was under no obligation to pay the debt, the law would not imply a contract of indemnity.[3]

§ 185. **How claim of surety against principal affected by usury—Wager.**—If the surety to a contract tainted with usury of which he has knowledge, pays the usury, it has been held that he cannot recover such usury from the principal, but can only recover what the creditor could have recovered.[4] But where the surety on an usurious note, who did not know of the usury when he signed it, but had knowledge of the fact when he paid it, sued the principal for indemnity, it was held he was entitled to recover unless he had been notified by the principal not to pay the the note before he paid it. The principal might avail himself of the statute against usury, but was not obliged to do so, and the surety could not know his intention in that regard, unless notified thereof.[5] So, where the creditor had recovered a judgment against principal and surety, and the surety had paid the judg-

[1] Thomas v. Beckman, 1 B. Mon. (Ky.) 29.

[2] Shaw v. Loud, 12 Mass. 447.

[3] Kimble v. Cummins, 3 Met. (Ky.) 327.

[4] Jones v. Joyner, 8 Ga. 562; Mims v. McDowell, 4 Ga. 182; Whitehead v. Peck, 1 Kelly (Ga.) 140.

[5] Ford v. Keith, 1 Mass. 139. For a case holding (under peculiar circumstances) that a surety can recover indemnity from the principal for usury which he has been compelled to pay, see Kock v. Block, 29 Ohio St. 565.

ment, it was held that the principal could not set up against the claim of the surety for indemnity, the fact that part of the judgment was for usury.[1] A surety having become liable on a note, the principal executed to him a bill of sale of chattels for his indemnity. Held, the bill of sale was executed upon sufficient consideration, even though the original note was usurious, unless the surety was privy to the usury.[2] Where a note was given to secure money bet in the State of Missouri, on the election of a President of the United States (such bet being prohibited by law), and a surety on the note, who knew when he signed it the consideration for which it was given, was compelled by legal process in a foreign jurisdiction to pay the same, it was held he could not recover indemnity from the principal. He was privy to an illegal transaction, and could ground no claim to relief upon it. If the principal could be in this manner compelled to pay, the policy of the law in making the note void would be defeated.[3]

§ 186. **When surety of one partner entitled to recover indemnity from the firm.**—When a partner gives his individual note, with surety for a debt of the firm and the surety pays it, he may recover indemnity at law from all the members of the firm.[4] The same thing was held where the note was under seal.[5] A and B were partners, and A hired help for which the firm would on general principles of law have been liable, but gave his individual bond with C as his surety for the hire. C had the debt to pay, and brought a suit in equity to recover indemnity from A and B. Held, he was entitled to recover from both.[6] One of several partners executed a bond in his individual name to the United States, for duties on goods imported on account of the partnership, and the plaintiffs executed the bond as sureties. The plaintiffs paid the debt and brought an action for money paid against all the partners. Held, they were not entitled to recover, as there was no privity between them and the partners, who did not sign the bond. The bond being under seal discharged the claim of the United States for the duties, and its remedy was thereafter on the

[1] Wade *v.* Green, 3 Humph. (Tenn.) 547. But see Luckings' Admr. *v.* Gegg, 12 Bush (Ky.) 298.

[2] Spaulding *v.* Austin, 2 Vt. 555.

[3] Harley *v.* Stapleton's Admr. 24 Mo. 248.

[4] Burns *v.* Parish, 3 B. Mon. (Ky.) 8; Hikes *v.* Crawford, 4 Bush. (Ky.) 19.

[5] Purviance *v.* Sutherland, 2 Ohio St. 478.

[6] Weaver *v.* Tapscott, Leigh 9 (Va.) 424.

bond, and against the parties alone who signed it. The remedy of the sureties was against the partner who signed the bond, although the court in one case said it might be if such partner was insolvent, and the firm owed him the sureties could have relief in equity.[1]

§ 187. **When principal liable to surety for costs paid by surety.**—Whether the surety, who has paid costs on account of the debt of the principal, can recover such costs from the principal, depends upon the circumstances of each case. It has been held that he may recover from the principal costs which he has in good faith incurred and paid, litigating the claim upon which he is surety.[2] An eminent judge, in discussing this subject, said: "If, when a surety was sued upon the debt of his principal, and was unable to pay it, and the same went into judgment and was levied upon his land, he must lose all costs recovered, and the expenses of the levy, because he did not pay the principal's debt more promptly than the debtor himself, whose duty it was to do it, and save the surety all trouble, it would certainly afford a remarkable instance of absurd refinement, not to say refined absurdity; and if the debt may be recovered (by the surety of the principal) as money paid, so equally may the costs."[3] Where a joint judgment is recovered against principal and surety, and the surety pays the judgment and costs, he may recover such costs from the principal. The principal has a right to defend the suit, and the surety is justified in letting the claim proceed to judgment, in the hope that the money may be made from the principal.[4] If the principal has agreed, in writing, to save the surety harmless, the surety may, on such agreement, recover costs which he has paid on account of the principal's debt.[5] If the surety on a note, who is indemnified from loss on account of his suretyship, incurs expenses in defending a suit on the note, contrary to the expressed wishes of the principal, and after he is notified by the principal that there is no defense, he cannot hold the principal liable for

[1] Embree v. Ellis, 2 Johns. 119; Krafts v. Creighton, 3 Richardson Law (So. Car.) 273.

[2] Downer v. Baxter, 30 Vt. 467; Bennett v. Dowling, 22 Texas, 660. See, also, on this subject, Whitworth v. Tilman, 40 Miss. 76; Thomson v. Taylor, 11 Hun. (N.Y.) 274.

[3] Per Redfield, C. J. in Hulett v. Soullard, 26 Vt. 295; to same effect, see Wynn v. Brooke, 5 Rawle (Pa.) 106; McKee v. Campbell, 27 Mich. 497.

[4] Apgar's Admr. v. Hiler, 4 Zabriskie (N. J.) 812.

[5] Bonney v. Seely, 2 Wend. 481.

such expenses.[1] It has been held that where a surety knows there is no defense to the suit against him, he can recover no costs except those of a judgment by default.[2] A undertook to pay certain debts of B, and C guarantied A's undertaking. A failed to pay one of the debts, and B was sued for it, and a judgment was had against him for the amount due and costs of suit. Held, B could not recover such costs from C. He should have paid the debt without suit, and prevented the making of costs.[3]

§ 188. **Mortgage for indemnity of surety valid—What it covers.**—The liability of a surety or guarantor for the debt of his principal before he has made any payment on account thereof, is a sufficient consideration for the execution of a mortgage or trust deed for his indemnity, and such mortgage or trust deed will take precedence of any subsequent lien on the property encumbered thereby.[4] A promissory note for the payment of a certain sum of money, executed for the purpose of indemnifying the payee against his liability as a surety for the maker of an administration bond, and to enable him to secure himself by an attachment of the property of the maker, is valid, notwithstanding the payee at the time of its execution has not been damnified. The existing liability with an implied promise to pay that amount upon the principal indebtedness, forming a sufficient consideration for the note, and the note will be enforced against the objections of other creditors.[5] Where principal and surety have signed notes, and before the maturity thereof the principal deposits money with the surety, upon the agreement that the surety shall apply the money so received to the payment of the notes, the principal cannot afterwards repudiate the agreement, the suretyship being a sufficient consideration to support it.[6] Where a mortgage is given for the indemnity of a surety, it remains valid for that purpose notwithstanding the evidences of the debt or the instruments by which the surety is bound may be changed. This was held where

[1] Beckley *v.* Munson, 22 Ct. 299.

[2] Holmes *v.* Weed, 24 Barb. (N. Y.) 546. On this subject, see Whitworth *v.* Tilman, 40 Miss. 76.

[3] Redfield *v.* Haight, 27 Ct. 31.

[4] Kramer *v.* Farmers and Mechanics Bank, 15 Ohio, 253; Uhler *v.* Semple, 5 C. E. Green (N. J.) 288; Perkins *v.* Mayfield, 5 Port. (Ala.) 182; Hawkins *v.* May, 12 Ala. 673; Lane *v.* Sleeper, 18 New Hamp. 209; Bank of Alabama *v.* M'Dade, 4 Port. (Ala.) 252; Pennington *v.* Woodall, 17 Ala. 685.

[5] Haseltine *v.* Guild, 11 New Hamp. 390. To the same effect, where the surety expressly promised the principal to pay the debt, see Gladwin *v.* Garrison, 13 Cal. 330.

[6] Mandigo *v.* Mandigo, 26 Mich. 349.

a mortgage was given conditioned to save the mortgagee harmless from his indorsement of certain specified notes, and such notes as they became due were renewed by the substitution of other notes or drafts having different names upon them, but the obligation of the mortgagee was preserved through the whole series of renewals.[1] So, a mortgage to secure accommodation indorsers on a note payable to a particular bank, and so described in the mortgage, is valid to secure the same indorsers, though that bank did not discount the note, and another bank discounted a similar note for the same purpose and with the same indorsers.[2]

§ 189. **Effect of the bankruptcy of the principal on the surety's claim for indemnity.**—A surety, who after the bankruptcy of the principal pays the debt, may generally recover indemnity from the principal for the money so paid. The reason is that until he has paid the debt he usually has no cause of action against the principal, and no claim which he can prove against the principal's estate.[3] Upon this principle it has been held, that a person discharged under an insolvent act, is liable to his surety for the arrears of an annuity due since his discharge, which the surety has been obliged to pay.[4] If, however, the bankrupt or insolvent act expressly provides for the adjustment of the claim for indemnity which a surety, who is liable at the time of the bankruptcy, may have, by reason of afterwards paying the debt, the terms of the statute will of course prevail. It has been held that such claim may be proved under the United States Bankrupt Law of 1867, and it will be barred unless it is proved.[5] A guardian made default and was afterwards discharged in bankruptcy. His surety was afterwards compelled to pay the defalcation, and sued him for indemnity. Held, the surety was entitled to recover, as debts created by embezzlement were expressly excepted from the operations of the

[1] Pond *v.* Clarke, 14 Ct. 334; Smith *v.* Prince, 14 Ct. 472; to same effect, see Markell *v.* Eichelberger, 12 Md. 78; Choteau *v.* Thompson, 3 Ohio St. 424.

[2] Patterson *v.* Martin, 7 Ohio, 225.

[3] Paul *v.* Jones, 1 Durn & East, 599; McMullin *v.* Bank of Penn Township, 2 Pa. St. 343; Taylor *v.* Mills, Cowper, 525; Cake *v.* Lewis, 8 Pa. St. 493; Wells *v.* Mace, 17 Vt. 503; Buel *v.* Gordon, 6 Johns. 126; Emery *v.* Clarke, 2 J. Scott (N. S.) 582; Comfort *v.* Eisenbeis, 11 Pa. St. 13; Haddens *v.* Chambers, 2 Dallas (Pa.) 236.

[4] Page *v.* Bussell, 2 Maule & Sel. 551; Welsh *v.* Welsh, 4 Maule & Sel. 333.

[5] Lipscomb *v.* Grace, 26 Ark. 231; disapproving, Pogue *v.* Joyner, 6 Ark. (1 Eng.) 241.

Bankrupt Act, and this debt was so created.[1] If, after the surety has paid the debt, the principal becomes a bankrupt and is discharged as such, the discharge will bar the claim of the surety against the principal.[2]

§ 190. **When surety may by express contract recover indemnity from principal before paying the debt—Mortgage of indemnity, etc.**—While the surety or guarantor has usually, in the absence of express contract, no right of action against the principal for indemnity until he has actually paid the debt, yet he may by express contract be given such right of action before payment of the debt. Thus where a bond of indemnity given to a surety on a lease, was conditioned for the payment of the rent, and to save him harmless from liability, it was held the surety could recover from the obligor the amount of the rent in arrear, even though he had not himself paid it. The Court said: "When a bond is, as in this case, conditioned as well to pay the debt or sum specified as to indemnify and save harmless the obligee against his liability to pay the same, the obligee may recover the entire debt or demand upon default in the payment without having paid anything."[3] The same thing was held where a bond to a sheriff was conditioned to save him harmless from all "loss and liabilities" which he might sustain by selling certain property levied on by him, and a judgment was recovered against him for selling the property, which judgment he had not paid.[4] So, where a mortgage was given to indemnify a surety, it was held he might foreclose the mortgage as soon as he was sued for the debt, and before he had paid it.[5] Where A, being the principal in a bond, gave a deed of trust, one of the provisions of which was that the trustee should "save harmless" B, who was his surety in the bond, and another provision was that the trustee, "whenever required by the creditors of A, or by any surety who may be threatened with loss by reason of his suretyship shall proceed to sell sufficient property to answer the ends of" the deed of trust, it was held that the trustee was not bound to

[1] Halliburton v. Carter, 55 Mo. 435.

[2] Smith v Kinney, 6 Neb. 447.

[3] Belloni v. Freeborn, 63 New York, 383, per Allen, J.

[4] Jones v. Childs, 8 Nevada, 121. To similar effect, see Carman v. Noble, 9 Pa. St. 366.

[5] Tankersley v. Anderson, 4 Des. Eq. (So. Car.) 44. To similar effect, see Thurston v. Prentiss, 1 Manning (Mich.) 193. See, also, on this point, Darst v. Bates, 51 Ill. 439.

wait till the surety was actually damnified, by having been compelled to pay the money, but that it was the duty of the trustee to relieve him, whenever he had funds for the purpose. The Court said that, in equity, the money might be applied directly to the relief of the surety without passing into his hands, and thus endangering the creditor.[1] Where the principal placed in the hands of his surety a horse for his indemnity, "upon condition, that if (he) had the money to pay," etc., it was held that upon the debt becoming due and remaining unpaid, the surety might sell the horse and pay the debt with the proceeds.[2] Principal and surety being joint makers of a promissory note, the principal covenanted with the surety to pay the amount specified in the note to the payees thereof on a given day, but made default. In an action on this covenant, it was held that the surety was entitled to recover the full amount of the note, although he had not paid any of it.[3] A surety being liable upon two promissory notes due at different times, took from the principal a bond and warrant of attorney, the penalty being in double the amount of the two notes, and the condition being for the payment of a sum equal to the amount of the two notes, at a time previous to the maturity of either. The first note became due, and the surety was obliged to pay it, and before the last note was due, and while it was unpaid, he entered up judgment on the bond for the amount of both notes. Held, the judgment was properly entered, and might be enforced even though the principal offered to pay the surety the amount he had paid on the first note.[4] Where a party, in contemplation of suicide, tied up in a bundle and left cash and notes indorsed to a surety, and addressed the bundle to the surety with directions that as soon as his death should be known the surety should, from the proceeds, indemnify himself, and if anything remained give it to the principal's children, and the surety received and claimed the property, it was held he might retain so much thereof as was necessary for his indemnity, and this upon the ground that, where a trust is created for a person without his

[1] Daniel v. Joyner, 3 Ired. Eq. (Nor. Car.) 513.

[2] Bird v. Benton, 2 Dev. Law (Nor. Car.) 179. A surety who has been compelled to pay the debt within the period of the statute of limitations, may enforce a mortgage of indemnity against the principal after the remedy of the creditor against the principal has been barred by that statute. Rucks v. Taylor, 49 Miss. 552.

[3] Loosemore v. Radford, 9 Mees. & Wels. 657.

[4] Smith v. James, 1 Miles (Pa.) 162.

knowledge, he may afterwards affirm it.[1] If the principal expressly agree to save the surety harmless from all loss and damage on account of the suretyship, the surety may, without paying the debt, recover damages for imprisonment, which he has suffered on account of the debt.[2] The allowance by commissioners of a debt of the principal against the estate of a surety, when duly reported to the probate court and registered among the claims against the estate, is a damnification, and will entitle the administrator to sue the principal upon his special promise to "indemnify and save harmless" the surety.[3] A promise by a principal to pay into the hands of a surety for his indemnity the amount for which he is bound, "whenever the surety shall be called upon by the creditor for payment, or shall have reason to doubt the ultimate ability of the principal to save him harmless," is a valid promise as against the creditors of the principal, and an action may be sustained on it by the surety against the principal, without paying any of the debt.[4]

§ 191. **When special contract of indemnity will not authorize surety to recover before paying the debt., etc.**—The right of the surety or guarantor to recover indemnity from the principal before himself paying the debt, manifestly depends upon the terms or legal effect of the express contract for indemnity. The liability of the surety for the debt of the principal is a sufficient consideration to support such a contract as against the principal or any of his creditors, and the terms or legal effect of the contract for indemnity will prevail, each particular case being governed by its own circumstances. After a note signed by principal and surety was due, the principal gave the surety a contract of indemnity, engaging to pay the note to the creditor "so as wholly to indemnify and save harmless the * (surety) from his liability on said note by reason of signing the same as surety." Held, this was but a common contract of indemnity, and the surety must have sustained actual damage to entitle him to sue on it, as it could not be presumed that the contract was made to entitle the surety to sue on it at once. If the note had not been due when the contract of indemnity was made, its construction would have been different.[5] Where a surety receives from the principal

[1] Woodbury v. Bowman, 14 Me. 154.

[2] Powell v. Smith, 8 Johns, 249.

[3] Adm'rs. of Pond v. Warner, 2 Vt. 532.

[4] Fletcher v. Edson, 8 Vt. 294.

[5] Adm'rs of Pond v. Warner, 2 Vt. 532; see, also, Jeffers v. Johnson, 1 Zabriskie (N. J.) 73.

as indemnity, the principal's note payable at a particular time, it has been held that he might sue upon it, although he had not been compelled to pay the debt, the fair presumption being that by making the note payable at a day certain, the parties intended to provide an indemnity against suit rather than against ultimate loss.[1] Where the note given by the principal to the surety for his indemnity is in the nature of a collateral security only, it has been held that the surety may, on such note, recover whatever sum he has actually paid out, up to the time of trial and no more.[2] If an indemnified surety, by his own act, causes property of the principal levied on for the payment of the debt, to be released, the indemnitor is thereby discharged. Thus, C as principal, and A as surety, executed a note, and B at the same time gave A an agreement to save him harmless from all loss on account of such suretyship. The creditor obtained a judgment against A and C, and levied on property of C sufficient to satisfy the debt. A then replevied (stayed) the judgment for two years, the effect of which was to release the property of C from the levy. Before the two years expired, C became insolvent, and A had the debt to pay. Held, he could recover nothing from B, as he had by his own act prevented the payment of the debt by C's property.[3] A mortgage given by a principal to a surety for his indemnity, can only be held by him for the very purpose for which it was given, and where it is given to indemnify him against payment of half a debt, it will not cover a payment of the other half.[4] Nor will such a mortgage cover a loan made by the surety to the principal.[5]

§ 192. **Surety may, before paying the debt, bring suit in chancery to compel principal to pay it.**—After the debt for which a surety or guarantor is liable has become due, he may, without paying the debt and without being called upon by the creditor, file a bill in equity to compel the principal to pay the debt; it being unreasonable that a surety or guarantor should always have a cloud hanging over him, even though not molested for the debt.[6]

[1] Russell *v.* La Roque, 11 Ala. 352.

[2] Little *v.* Little, 13 Pick. 426; Osgood *v.* Osgood, 39 New Hamp. 209; Child *v.* Powder Works, 44 New Hamp. 354: *contra*, Woodbridge *v.* Scott, 3 Brevard (So. Car.) 193; see on this subject, Williams *v.* Cheney, 3 Gray, 215.

[3] Pope *v.* Davidson, 5, J. J. Marsh (Ky.) 400.

[4] Newell *v.* Hurlburt, 2 Vt. 351. On same point, see McDowell *v.* Crook, 10 La. An. 31.

[5] Clark *v.* Oman, 15 Gray, 521.

[6] West *v.* Chasten, 12 Florida, 315; Antrobus *v.* Davidson, 3 Merivale, 569;

This principle is universally recognized, and has been applied to a great variety of circumstances. Thus, a surety on a bond to secure a money debt was secured by another bond of indemnity, entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust, to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the court. Held, that the surety, although he had not paid anything, was entitled to maintain a bill against the executors for administration, payment of the debt, and indemnity, and that it was not necessary that the bill should be filed on behalf of all the creditors. The court said the following was the rule: "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered by a bill which has been sometimes called a bill *quia timet*, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress or impleading. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances."[1] A surety whose principal is dead, may, before paying the debt, file a bill against the creditor and the executor of the debtor, to compel the executor to pay the debt, so as to exonerate the surety from liability. He may enforce, for his exoneration, any lien of the creditor on the estate of the principal, and may bring any suit in equity which the creditor could bring for the settlement of accounts and administration of the assets, whether legal or equitable, but the creditor must be a party, that he may receive the money when it is recovered.[2] The fact that

Irick *v.* Black, 2 C. E. Green (N. J.) 189; Bishop *v.* Day, 13 Vt. 81; Thigpen *v.* Price, Phillips Eq. (Nor. Car.) 146; Taylor *v.* Miller, Phillips Eq. (Nor. Car.) 365; Saylors *v.* Saylors, 3 Heisk. (Tenn.) 525; Greene *v.* Starnes, 1 Heisk. (Tenn.) 582; Howell *v.* Cobb, 2 Cold. (Tenn.) 104.

[1] Woldridge *v.* Norris, (Law Rep.) 6 Eq. Cas. 410, per Giffard, V. C.; see, also, Miller *v.* Speed, 9 Heisk. (Tenn.) 196.

[2] Stephenson *v.* Taverners, 9 Gratt. (Va.) 398.

an administrator had become insolvent and wasted the assets, it has been held will not, before the time for settling the estate has come, entitle the surety of such administrator to file a bill to prevent persons who owed the estate from paying the administrator, and to compel the administrator to give the surety security. The court said payment by the debtors ought not to be enjoined, as they might become insolvent, and the surety not having originally demanded indemnity, could not demand it subsequently, but after the time for settling the estate arrived, a bill might be filed by the surety to compel the distribution of the assets.[1] A mortgagee who is also surety for the debt secured by the mortgage, has no right to have the mortgaged premises sold before the debt becomes due, even though the same are in a state of ruin and decay, in consequence of storms, and are daily getting worse. The court said: "The security was taken with knowledge of the situation and character of the property, and of the risks to which it was exposed. It does not belong to the court to give a party better security than he elected to take, where there has been no fraud or mistake, nor any abuse or waste of the subject. I am not informed that there exists any precedent for a bill *quia timet* adapted to such a case. All the cases in the English law, in which even a surety may file a bill *quia timet* are those in which the debt was due from the principal debtor; and I do not know of any principle of equity that will justify us in giving aid to the surety before the debt is due, when the parties have not provided in their contract for such a case."[2]

§ 193. **Cases in which a surety may have relief in equity before paying the debt.**—A surety or guarantor who holds a mortgage on the property of his principal, may, after the maturity of the debt, and before paying it, have the mortgage foreclosed, and the proceeds thereof applied to the payment of the debt.[3] It has been held that for any sum which a surety for the price of land purchased by another has paid, or is liable to pay, on that account, he has an equity to be reimbursed or exonerated by a sale of the land, and to that end he has a right to file his bill to prevent a conveyance to the purchaser by the vendor,

[1] Delaney *v.* Tipton, 3 Hayw. (Tenn.) 14.

[2] Campbell *v.* Macomb, 4 Johns. Ch. R. 534, per Kent, C.

[3] Kramer *v.* Farmers' & Mechanics' Bank, 15 Ohio, 253; DeCottes *v.* Jeffers, 7 Florida, 284; Markell *v.* Eichelberger, 12 Md. 78; Succession of Montgomery, 2 La. An. 469.

who has kept the title as a security for the purchase money.[1] Where the surety of an insolvent principal obtains without fraud the legal title to a fund belonging to his principal, equity will not compel him to surrender the legal title to his principal, so that the principal may dispose of the fund as he pleases; but if the surety has not paid the debt will authorize and compel him to apply the fund to its satisfaction.[2] Where a joint judgment was recovered against a principal and surety, and the principal had property subject to execution, on which the judgment was a lien, and sold such property to a person who was about to remove the same without the jurisdiction of the court, it was held the surety might by suit in chancery prevent the removal of the property.[3] Where a party was surety on a bond given by a deputy sheriff to the sheriff, and had taken a mortgage on personal property for his indemnity, and the sheriff and the deputy had collected money for which the sheriff was sued, and the deputy had departed the jurisdiction, and the mortgaged property had come into the possession of a third party upon a pretended claim of right, which party was charged with an intention of removing it beyond the jurisdiction of the court, it was held that the court would restrain such third party from removing the property, and require bond and security for its forthcoming to answer the claim of the surety.[4]

§ 194. **Cases in which a surety cannot recover indemnity from the principal.**—The surety who pays a debt for which the principal is not liable, cannot generally recover the money so paid from the principal. Thus, where the surety in a bond against incumbrances paid the costs of defending two suits which the bond did not cover, under the mistaken belief that he was liable therefor, it was held he could not recover the same from his principal.[5] So, where in an action of replevin, a bond with surety is filed by the plaintiff, and possession of the property is obtained by him, and afterwards the suit is dismissed by agreement of the parties, the plaintiff agreeing to pay the defendant a certain sum, but no judgment is rendered, if the surety afterwards, without the request of the plaintiff, pays the amount agreed to be paid to the defendant, he cannot recover the same from his principal, as the

[1] Smith *v.* Smith, 5 Ired. Eq. (Nor. Car.) 34.

[2] McKnight *v.* Bradley, 10 Rich. Eq. (So. Car.) 557.

[3] Anderson *v.* Walton, 35 Ga. 202.

[4] Outlaw *v.* Reddick, 11 Ga. 669.

[5] Bancroft *v.* Abbott, 3 Allen, 524.

payment is, in such case, a voluntary one on the part of the surety.[1] Where a county court borrowed money without any legal authority so to do, and the plaintiff became the county's surety on the bond for the borrowed money, a part of which he had since been compelled to pay, it was held that such plaintiff had no right to call upon the county to reimburse him for the amount already paid, or to exonerate him from the payment of the balance remaining unpaid. The county was not in any manner bound to the creditor, and could not be to the surety.[2] Where a surety paid a debt after personal property of the principal sufficient to satisfy the debt, had been levied upon, it was held, he could not recover indemnity from the principal. The levy was *prima facie*, a satisfaction of the debt, and the surety had paid a debt which the principal had already paid.[3] A surety being imprisoned on account of the debt of two principals, agreed with one of them that he would pay one-half the debt if such principal would pay the other half, and this was done. The surety then sued both principals for indemnity. Held, he could not recover from the one with whom he had made the agreement. The implied presence of indemnity which the law would have raised was superseded by the express contract.[4] But it has been held that an agreement by a surety that he will surrender a note of the principal, if the principal will procure his release from his obligation as surety, is void for want of consideration, the ground of the decision being that the principal was bound to indemnify the surety, and, in procuring his release, he had only done what he was under a legal obligation to do.[5] The master of a vessel, as principal, together with a surety, entered into a bond that the vessel should not take any slave from one of the Bahama Islands. A slave concealed himself in the vessel and was taken to New York, where the surety filed a bill against the principal for a *ne exeat* and indemnity. Held, the bill could not be sustained, as it was not certain that either principal or surety was liable, and the Court would never lend its aid to enforce a forfeiture.[6] Where a surety buys a judgment against

[1] Hollinsbee *v.* Ritchey, 49 Ind. 261.

[2] Davis *v.* Board of Comm'rs, 72 Nor. Car. 441; Davis *v.* Commissioners of Stokes Co. 74 Nor Car. 374.

[3] Brown *v.* Kidd, 34 Miss. 291. To a contrary effect, see Clark *v.* Bell, 8 Humph. (Tenn.) 26.

[4] Duncan *v.* Keiffer, 3 Bin. (Pa.) 126.

[5] Ritenour *v.* Mathews, 42 Ind. 7.

[6] Gibbs *v.* Mennard, 6 Paige Ch. R. 258.

himself and his principal in the name of another person, he cannot recover indemnity from the principal without first satisfying the judgment. He may either proceed upon the judgment or satisfy the judgment and sue the principal for money paid, but he cannot do both.[1]

§ 195. **Set-off—Surety may bid at execution sale of principal's property—Surety may assign his claim against the principal, etc.**—In a suit by administrators of an insolvent estate against one who was surety in a note for the decedent, such surety is entitled to set off a payment by him of such note, although the payment was made after the institution of the suit by the administrators against him. It is not like a claim brought by a party after suit is brought against him, for although the surety's right to indemnity from the principal was not perfect till he paid the debt, yet it was "founded upon a contract which existed before."[2] If the surety for a debt pay the same before it is due, the payment will, after the debt has become due, but not before, be a legal set-off against a note of the surety, payable to the principal and held by him.[3] Where a surety who had not paid the debt filed a bill against his principal, alleging that the principal was about to remove from the State and carry with him all his property, and prayed for an injunction to prevent the removal, etc., it was held that, in the absence of any statutory provision on the subject, he was not entitled to relief.[4] It has been held that a surety, before paying the debt, may file a bill to set aside fraudulent conveyances made by his principal,[5] and the contrary has also been held.[6] A surety having property of his principal in his hands, may surrender the same on an execution against his principal, and may purchase the same at the sale under the execution,[7] and he may so purchase, although the judgment is rendered against him and his principal jointly.[8] But where a principal debtor, with money sufficient to pay the debt in his pocket, suffered the property of his surety to be sold on an execution

[1] Hodges *v.* Armstrong, 3 Dev. Law (Nor. Car.) 253.

[2] Beaver *v.* Beaver, 23 Pa. St. 167, per Lewis, J. To a contrary effect, see Walker *v.* McKay, 2 Met. (Ky.) 294.

[3] Jackson *v.* Adamson, 7 Blackf. (Ind.) 597.

[4] Buford *v.* Francisco, 3 Dana (Ky.) 68.

[5] Taylor *v.* Executor of Heriot, 4 Des. Eq. (So. Car.) 227.

[6] Williams *v.* Tipton, 5 Humph. (Tenn.) 66.

[7] Horsefield *v.* Cost, Addison (Pa.) 152.

[8] Carlos *v.* Ansley, 8 Ala. 900.

against him, and the surety and himself became the purchaser, it was held to be doubtful whether even at law such sale, as against the surety, was not a mere nullity, and that in a court of equity such a purchaser would not be allowed to set up a title thus acquired against his surety.[1] A bond given by an executor (who had been appointed executor by the will but had not given bond) for the payment to his surety of one-half his commissions from time to time, as they may be allowed, in consideration of his consenting to become such surety, is a valid instrument. It is not an agreement to pay money in order to obtain an appointment, but a legitimate means of carrying out the wishes of the testator.[2] A principal executed a deed of trust to secure certain debts, among them one on which there was a surety. The surety had to pay the debt, and assigned all his interest in the deed of trust to a third person. Held, such third person might enforce and have the benefit of the deed of trust.[3] A surety who has two indemnities may usually resort to either, at his option.[4]

§ 196. **When insolvent principal cannot collect debt due him by surety—Verbal guarantor who pays debt may recover indemnity—Other cases.**—A principal who is insolvent cannot collect a debt which the surety owes him, without first indemnifying the surety. "A surety has in respect to his liability the rights of a creditor as against his principal; and upon the insolvency of the principal debtor he may retain any funds belonging to such debtor, by way of indemnity against his liability; otherwise a surety in such a case would be wholly without remedy when the plainest principles of justice are in his favor."[5] And the assignee of a judgment obtained by the principal against the surety will in such case stand in no better position than the principal.[6] An executor being surety for his testator, paid the debt after the testator's death. Held, he had a right to retain this debt the same as he would have a right to retain any other debt of equal degree due by the testator to him.[7] One who has verbally guarantied the debt of another at his request, may pay

[1] Perry *v.* Yarborough, 3 Jones Eq. (Nor. Car.) 66.

[2] Culbertson *v.* Stillinger, Taney's Decisions (Campbell) 75.

[3] York *v.* Landis, 65 Nor. Car. 535.

[4] Muller *v.* Downs, 94 United States, 444.

[5] Abbey *v.* Van Campen, 1 Freem. Ch. R. (Miss.) 273.

[6] Williams *v.* Helme, 1 Dev. Eq. (Nor. Car.) 151.

[7] Boyd *v.* Brooks, 34 Beavan, 7; *contra*, Anonymous, Godbolt, 149.

the same and recover indemnity from his principal, and the Statute of Frauds will be no defense in such case, although it would be a defense to an action on the guaranty. The contract of guaranty was not void, and the guarantor had a right to perform his parol agreement.[1] If the surety, on a note given by an infant for necessaries, pay it, he may recover indemnity from the infant. "If the infant is not liable on the note, as he would not be if he elected to avoid such liability, an assumpsit upon the delivery of the goods must be considered as subsisting against him, and the note of the surety be regarded as collateral security for the payment.[2] As long as a judgment against the principal can be enforced in any way, either by *scire facias* or action of debt, the payment of such judgment by a surety is not voluntary, and he may recover indemnity from the principal.[3]

§ 197. **Surety on note who pays without notice of failure of consideration, may recover indemnity—When surety, who has joined in fraudulent scheme with principal, may recover indemnity—Other cases.**—A payment made by a surety in compromise of his supposed liability upon a disputed claim against him and his principal, may be recovered by the surety from the principal if it turns out that there was an actual liability, and the principal has or is entitled to the benefit of the payment in discharge of so much of the original claim against him.[4] A surety, who without notice of the failure of consideration of a note, pays it after it is due, may, notwithstanding such failure of consideration, recover indemnity from the principal.[5] After judgment against the surety in a replevin bond, he paid the judgment and sued his principal for indemnity. The principal set up that he had no title to the property replevied, and the surety knew it at the time, and the replevin was sued out by collusion between him and the surety to get the property, and that they were joint tort feasors and neither could recover from the other. Held, no defense. The court said: "If the giving of the bond was a fraud it was one of a singular character, for it indemnified the intended victim. This suit is not brought upon any illegal contract."[6]

[1] Beal *v.* Brown, 13 Allen, 114.

[2] Conn *v.* Coburn, 7 New Hamp. 368.

[3] Randolph *v.* Randolph, 3 Randolph (Va.) 490.

[4] Bancroft *v.* Pearce, 27 Vt. 668.

[5] Gasquet *v.* Oakey, 19 La. (Curry) 76; see on this subject Gates *v.* Renfroe, 7 La. An. 569.

[6] Smith *v.* Rines, 32 Me. 177, per Howard, J.

Where a bond with A as surety is given to the United States, and B is mentioned in the bond as the importer, and A pays the bond, he may maintain an action for indemnity against B, although in fact a third person was owner of the goods. The claim of the United States was extinguished by the bond, and the surety has a right to sue the principal in such bond.[1] A principal placed in the hands of his surety certain securities for his indemnity. The surety paid a portion of the debts for which he was liable, and collected from the securities in his hands an amount as great as he had paid out, but he still remained liable for other debts of the principal. Held, he must apply the money so collected to indemnifying himself for the money already paid by him for the principal, and that he could not then sue the principal for indemnity.[2]

§ 198. **Other cases as to rights of surety against principal.**— If several parties sign a note as principals, and one of them pays it, he may sue the others for indemnity, and show by parol that they were principals, and he a surety.[3] So, where two of three parties who signed a note, added to their names the word "surety," and one of them paid it, he may, in a suit for indemnity against the other, show that he was a principal, notwithstanding the addition to his name of the word "surety."[4] The same thing was held where a principal, during his minority, contracted a debt for which a surety gave his note; and after his majority the principal, on the bottom of the note, acknowledged himself holden as co-surety.[5] It has been held that the fact that after a note becomes due a new surety signs it, will not prevent the original surety, who afterwards pays the note, from recovering indemnity from the principal. The payment was not voluntary, the addition of the name of the new surety not annulling the original liability on the note.[6] A husband and wife owned real estate, each one half in fee, and made a mortgage to secure the debt of the husband, which was not properly acknowledged, and did not convey the wife's interest. Subsequently they made another mortgage to secure a debt of the husband to another party, which was duly acknowledged, and the mortgaged property was sold. Held, the

[1] Sluby *v.* Champlain, 4 Johns. 461.

[2] Whipple *v.* Briggs, 30 Vt. 111.

[3] Dickey *v.* Rogers, 19 Martin (La.) 7 N. S. 588.

[4] Apgar's Admr. *v.* Hiler, 4 Zab. (N. J.) 812.

[5] Thompson *v.* Linscott, 2 Greenl. (Me.) 186.

[6] Catton *v.* Simpson, 8 Adol. & Ell. 136

proceeds should be applied, first to pay the last mortgage, and the overplus should be applied to reimburse the wife for her land so sold; she being as to it the surety of her husband, and her equity as such surety being to have all the property mortgaged by her husband applied to pay the debt for which she was surety before her property was touched.[1] If an official bond, given by a sheriff and his sureties, be so worded as not to be joint and several, but joint only, a court of chancery is the proper tribunal to give the sureties relief against the estate of the sheriff after his death, upon their being compelled to pay a sum of money on account of the delinquency of such sheriff in his lifetime.[2] It is not necessary for the principal to make the surety a party to a suit in chancery which he may bring to assert any equity he may have against the demand for which he and the surety are bound at law.[3]

§ 199. **Statute of limitations, as between surety and principal.**—Ordinarily, the statute of limitations begins to run in favor of the principal, and against the surety who pays the debt, from the time of such payment, and not from the time when the debt became due, because until the surety has been compelled to make such payment, there is no breach of the implied promise of the principal to indemnify him.[4] When a surety has paid money for the principal, part inside and part outside the statute of limitations, on account of the same debt, all payments outside the statute are barred thereby.[5] On a contract to indemnify a plaintiff against costs, which he is afterwards called on to pay, the cause of action arises when he pays, and not when the costs are incurred, or the attorney's bill delivered to such plaintiff, and the statute of limitations, therefore, begins to run from the time of

[1] Johns. v. Reardon, 11 Md. 465.

[2] Mountjoy v. Banks' Exrs. 6 Munf. (Va.) 387.

[3] Bently v. Gregory, 7 T. B. Mon. (Ky.) 368.

[4] Thayer v. Daniels, 110 Mass. 345; Burton v. Rutherford, Admr. 49 Mo. 255; Scott v. Nichols, 27 Miss. 94; Shepard v. Ogden, 2 Scam. (Ill.) 257; Wesley Church v. Moore, 10 Pa. St. 273; Bullock v. Campbell, 9 Gill (Md.) 182; Walker v. Lathrop, 6 Iowa, (Clarke) 516; Barnsback v. Reiner, 8 Minn. 59; Reid v. Flippen, 47 Ga. 273; McLane v. Ragsdale, 31 Miss. 701; Rucks v. Taylor, 49 Miss. 552; Considine v. Considine, 9 Irish Law Rep. 400. See, also, on this subject, Keller v. Rhoads, 39 Pa. St. 513.

[5] Davies v. Humphreys, 6 Mees. & Wels. 153; the contrary has been held where the principal was not notified of the payment of the first instalments; see Williams' Admr. v. Williams' Admr. 5 Ohio, 444.

such payment.[1] A and B were sureties of C, and shortly after the debt became due, A paid it. Four years afterwards B paid A one-half the sum A had paid. All these payments were made without suit. After the statute of limitations had run from the time A paid, and before it had run from the time B paid, B sued C for indemnity. Held, B's claim for indemnity was not barred by the statute. The cause of action of B against C accrued at the time of the payment by B to A.[2] Where a party upon whom a bill of exchange was drawn, paid it for accommodation of the drawer, and after the statute of limitations would have barred an open account, and before it would have barred a suit on the bill of exchange, he sued the drawer for indemnity, it was held he could recover, because he was entitled to subrogation to the rights of the creditor against the principal, and his claim was therefore on the bill of exchange. The court said: "The rights to which he is entitled to be thus subrogated, are those which the creditor had while the obligation of the contract subsisted, not such as he had after the debt has been paid. * The doctrine is that the payment entitles the surety to be subrogated to all the rights of the creditor. It was his right to sue upon the contract. The surety upon payment is subrogated to this right, and may in like manner maintain his action."[3] When a surety pays the creditor the amount of a judgment against him and the principal, and the creditor assigns the judgment to the surety, he may avail himself of the judgment, and the statute of limitations will not apply to the judgment as it would to the implied assumpsit that would accrue to him upon paying off the judgment.[4]

[1] Collinge v. Heywood, 9 Adol. & Ell. 633.

[2] Odlin v. Greenleaf, 3 New Hamp. 270.

[3] Sublett v. McKinney, 19 Texas, 438, per Wheeler, J.

[4] Morrison v. Page, 9 Dana (Ky. 428.

CHAPTER X.

OF THE RIGHTS OF THE SURETY OR GUARANTOR AGAINST THE CREDITOR AND THIRD PERSONS.

§ 200. **Surety not discharged by lawful act of creditor—Instances.**—Under the general head rights of the surety against the creditor might properly be treated most of the grounds for the discharge of the surety, as it is an invasion of those rights

which furnishes the grounds for such discharge. Separate chapters have, however, been devoted to an examination of the most important of those grounds, and it is proposed here to treat only of those rights of the surety against the creditor which do not properly fall under other subdivisions of this work. "A creditor discharges a surety by any dealing or arrangement with the principal debtor without the surety's assent, which at all varies the situation, rights or remedies of the surety."[1] But "the act of the creditor which injures the surety, or increases his risk, or exposes him to greater liability, which will operate as a discharge, must be some act which the law does not authorize or sanction, or the omission of some act specially enjoined by the law."[2] Thus, the fact that a creditor, after principal and surety are bound for a certain sum, lends the principal a much larger sum, and takes a bond from the principal for such larger sum, does not discharge the surety.[3] So, where the proprietor of a newspaper sold it, together with its press, type, good will, etc., and the purchaser gave notes with surety for the purchase money, and the vendor afterwards started in the same town another newspaper, which took so much patronage from the newspaper he had sold that the purchaser was unable to pay his notes, it was held the surety was not discharged, as the starting and carrying on of the new newspaper, there being no agreement to the contrary, was a legal and permissible act on the part of the vendor.[4] Where a creditor, who was an attorney, obtained, as attorney for other creditors, an adjudication in bankruptcy against the principal judgment debtor, and thus prevented a lien from attaching on part of his property, it was held the surety was not discharged thereby. The act of the creditor was lawful, and even if it worked an injury to the surety, he could not complain.[5] A decedent directed by his will that all his real estate should be sold, and the proceeds divided among certain of his children. One of his daughters married A, and he purchased a tract of the decedent's land at the executor's sale, and gave a note, with B as surety, for the purchase money. The surety and all parties then expected that the note would be

[1] Per Lord Truro, C. in Owen *v.* Homan, 3 Macn. & Gor. 378; see, also, Watkins *v.* Worthington, 2 Bland's Ch. R. (Md.) 509. If the surety consent to the injurious act, he is not discharged; Burns *v.* Parks, 53 Ga. 61.

[2] Stewart *v.* Barrow, 55 Ga. 664, per Warner, C. J.

[3] Eyre *v.* Everett, 2 Russell, 381.

[4] Rupp *v.* Over, 3 Brewster (Pa.) 133.

[5] Thornton *v.* Thornton, 63 Nor. Car. 211.

paid by the distributive share of A's wife. She afterwards commenced a suit for divorce against A, in which she was successful, and had most of her distributive share decreed to her. The note was not paid, and the surety claimed to be discharged, because the fund he had relied upon for payment had been diverted from its purpose. Held, he was not discharged, as the diversion of the fund was not the act of the creditor, but was the result of the wrong-doing of the principal.[1]

§ 201. **How fraud of the creditor operates on liability of the surety.**—If a surety is induced to become such by a fraud perpetrated on him by the creditor, as by false representations as to material facts, that will be a good defense; but "the representation to avoid the contract as to the surety, must be a fraud on him, as such, and in that character."[2] If the creditor intrusts the note of the principal and sureties to the principal for some fraudulent purpose, and consents that he shall make the sureties believe the debt is paid, and they are thus induced to forego any advantage they would otherwise have had, the sureties will be discharged. But it is otherwise if the note was intrusted to the principal for an honest purpose, and the creditor did not know of, or consent to the false representations.[3] On a composition between a debtor and creditor, they induced a third person to become surety for the payment of one-half the debt, by representing to him that this was to be in full of all demands; and the debtor, in pursuance of a previous arrangement of which the surety was unapprised, gave his own note for an additional sum: Held, the note was void and could not be enforced against the maker, who was the principal debtor, on the ground that the taking of such note was a fraud on the surety, of which the principal might avail himself.[4] But where a party bought a team for $700, and requested a surety to sign a note for $500 in payment for the same, and the seller, in answer to an inquiry by the surety, told him the price of the team was $500, and the surety thereupon signed the note, and the purchaser, without the knowledge of the surety, gave the seller a note for $200 in addition, it was held that this last note was binding on the purchaser. The court said: "The surety has no interest in the transaction between

[1] Ross v. Clore, 3 Dana (Ky.) 189.

[2] Evans v. Keeland, 9 Ala. 42, per Ormond, J.

[3] Admr. of Wilson v. Green, 25 Vt. 450.

[4] Weed v. Bentley, 6 Hill (N. Y.) 56.

the principal and creditor beyond his own indemnity. He is not supposed to stipulate or assume that the principal shall receive any specific benefit from the transaction, analogous to that which parties to a creditor's composition arrange for their common debtor. The principal stands in no relation of tutelage or wardship to the surety, that lays the foundation of any presumption that the latter in assuming suretyship, is arranging an advancement or the like for the principal."[1] A surety for the price of property bought by the principal, cannot usually set up as a defense that a fraud was perpetrated on the principal in making the sale, unless the principal himself repudiates the transaction. This is on the principle that the contract of the surety is accessory to the principal debt, and if the debtor himself admits the debt to be due, the surety cannot be permitted to deny it, for that would be to permit the principal to "retain the fruits of the contract, whilst the surety would avoid the performance of his obligation on the ground of its invalidity."[2] The president and chief stockholder of a national bank had caused it to be guilty of several acts prohibited by the banking law, and for which it might have been wound up. While the bank was in this condition he sold it, and was in such sale guilty of other violations of the banking law, for which the bank might have been wound up. A third party, without the knowledge of these facts, became the surety of the purchaser on certain notes for part of the purchase price, and gave a mortgage on her property to secure the purchase money. The bank soon after failed, and the surety upon learning the facts filed a bill to obtain relief from the notes and mortgage. Held, the relief should be granted. It was urged that the purchasers did not seek to rescind the sale, and that it would be inequitable to allow them to retain the property and discharge the surety. But the Court said that through the violation of law by the bank president, who was the creditor, the bank was rendered substantially worthless, and proceeded: "Indeed, it may be deduced from settled principles in this country and in England, in accordance with what is distinctly affirmed in the civil law, that the agreement of the surety is not binding where the bargain between the primary parties

[1] Mead v. Merrill, 30 New Hamp. 472, per Woods, C. J.; same thing reaffirmed, Mead v. Merrill, 33 New Hamp. 437.

[2] Evans v. Keeland, 9 Ala. 42, per Ormond, J.; Brown v. Wright, 7 T. B. Monroe (Ky.) 396.

out of which it springs is contaminated by positive irregularities. * Having been induced to become surety in the purchase of a bank, when her principals and the seller without her knowledge adopted terms and conditions which were illegal, greatly injurious to the bank, prejudicial to her interests and serving to impair her chance of protection and indemnification, she ought not on applying for relief from her undertaking, to have the doors of the court closed against her, upon the objection that the seller and her principals have allowed the matter to stand. * Here we have positive illegality, a violation of public policy, and a fraud of a public nature which was adapted to operate, and did operate, against complainant with all the severity and mischief of a direct fraud upon her." [1]

§ 202. **Surety may avail himself of defense of usury.**—The surety on a note may avail himself of the defense of usury to the same extent that the principal can. If it was otherwise, the principal would stand in a better position than his surety, and the surety could either not recover indemnity from the principal for the usury paid by him, or the statute against usury would be evaded.[2] Principal and surety signed a replevin (stay) bond, and the principal paid large amounts of usurious interest at various times for extensions. Held, the surety might by a separate bill filed for that purpose, with or without the consent of the principal, be allowed as credits on his bond the usurious interest paid by the principal.[3] Where a judgment was entered on a bond tainted with usury, of which usury the surety had no knowledge when he became bound, and the creditor filed a bill to subject equities of the surety to the payment of the judgment, it was held that the surety could not by cross-bill allege the usury and have relief against it without a tender of the amount due in equity.[4] It has been held, that after a principal has been discharged in bankruptcy, a surety when sued for the debt cannot set off usury paid by the principal to the creditor on contracts other than the one sued on, and this upon the ground that by the terms of the bankrupt act all debts due the bankrupt

[1] Denison *v.* Gibson, 24 Mich, 187, per Graves, J.

[2] Gray's Exrs. *v.* Brown, 22 Ala. 262; Stockton *v.* Coleman, 39 Ind. 106; Huntress *v.* Patten, 20 Me. 28; Weimer *v.* Shelton, 7 Mo. 237.

[3] Curtcher *v.* Trabue, 5 Dana (Ky.) 80.

[4] Bank of Wooster *v.* Stevens, 6 Ohio St. 262.

signee.[1] Where a surety, knowing a debt was usurious, and the principal paid him by a transfer of property, sued the creditor to recover the usury, which he could have done if he had himself paid the usury in money, it was held he was not entitled to recover.[2]

§ 203. **Whether surety may avail himself of set-off in favor of principal and against creditor.**—As to whether a surety, when sued for the debt of his principal, can at law avail himself of a set-off existing in favor of the principal against the creditor, the cases do not agree, but the weight of authority is that he may so avail himself of such set-off.[3] The reasoning upon which these decisions proceed, has been thus expressed: "Although by our statute proper matters for set-off are mutual demands only * yet it is not considered as conflicting with this rule to offset a note signed by a principal and his surety against a note running to such principal alone; the debt in such case being considered as the debt of the principal."[4] In an action at law against a principal and surety on a note, it has been held competent to recoup the damages of the principal growing out of the contract to the same extent as if the note had been given by the principal and he alone were sued.[5] The same thing has been held to be a good equitable defense to an action at law under a statute allowing equitable defenses to be made at law.[6] In debt on the bond of a city marshal, against the principal and sureties, it was held that the claim of the marshal alone against the city for services was admissible as a set-off, notwithstanding the fact that the bond was under seal.[7] Judgment was recovered by a creditor against a principal and surety, and the principal recovered a judgment against the creditor, who was insolvent. Held, the surety might, by suit in chancery, have the one judgment set off against the other, as the debts were in reality mutual, and equity would look beyond the form of the debt to the actual facts.[8] A held the note of B, on which C and D were sureties.

[1] Woolfolk *v.* Plant, 46 Ga. 422.

[2] Whitehead *v.* Peck, 1 Kelly (Ga.) 140.

[3] Andrews *v.* Varrell, 46 New Hamp. 17; Hollister *v.* Davis, 54 Pa. St. 508; Cole *v.* Justice, 8 Ala. 793; Bronaugh *v.* Neal, 1 Robinson (La.) 23; Concord *v.* Pillsbury, 33 New Hamp. 310.

[4] Per Sargent, J. in Andrews *v.* Varrell, 46 New Hamp. 17.

[5] Waterman *v.* Clark, 76 Ill. 428.

[6] Beehervaise *v.* Lewis, Law Rep. 7 Com. Pl. 372.

[7] Concord *v.* Pillsbury, 33 New Hamp. 310.

[8] Downer *v.* Dana, 17 Vt. 518.

A sued B and recovered a judgment, but for a less amount than he claimed, in consequence, as he alleged, of B's false swearing. A then swore out a warrant for the arrest of B on a charge of perjury, and B fled the state. In consideration that A would drop the prosecution, B gave A the note of one Mills for $500, which was all the property B had. Held, that C and D might, by suit in chancery, have the note applied to the payment of the debt for which they were liable.[1] On the other-hand, it has been held that a surety cannot at law avail of a set-off recoupment or counter claim existing in favor of the principal against the creditor.[2] This is put upon the ground that the principal has a right to bring a separate action for his claim against the creditor, and that he could not do this if the surety was allowed to set it up as a defense, and thus he might lose a much larger sum than that for which the surety was liable. It was, however, admitted in those cases, that the surety might have relief in equity by a suit to which the principal was a party. It has also been held that the creditor cannot at law set off a debt which he claims to be due him from a guarantor, against a debt which he owes such guarantor.[3]

§ 204. **Creditor not bound to exhaust securities put up by principal before suing surety—when surety without paying may enforce securities for the debt.**—According to the English law, the creditor cannot be compelled, before proceeding against the surety, to exhaust a mortgage or other security which he may hold from the principal for the payment of the debt, although it is otherwise by the civil law.[4] The remedy of the surety is to himself pay the debt, and he will then be subrogated to, and may enforce, all liens held by the creditor for the payment of the debt. A creditor in New Jersey, where the parties resided, took from B, the holder of a promissory note indorsed by the plaintiff, on a loan of money alleged to be usurious, a bond and mortgage, which was, if valid, an ample security for the debt, and instead

[1] Breese v. Schuler, 48 Ill. 329.

[2] Gillespie v. Torrance, 25 New York, 306; Lafarge v. Halsey, 1 Bosw. (N. Y.) 171; Lasher v. Williamson, 55 New York, 619. On same subject, see Poorman v. Goswiler, 2 Watts (Pa.) 69.

[3] Morley v. Inglis, 4 Bing. (N. C.) 58; *Id.* 5 Scott, 314.

[4] Watson v. Sutherland, 1 Cooper, Ch. R. (Tenn.) 208; Hayes v. Ward, 4 Johns. Ch. R. 123; Buck v. Sanders, 1 Dana (Ky.) 187. See on same subject, Gary v. Cannon, 3 Ired. Eq. (Nor. Car.) 64. See, also, Irick v. Black, 2 C. E. Green (N. J.) 189.

of resorting to the bond and mortgage, or to the principal, sued the plaintiff in New York on his indorsement. The plaintiff filed a bill to enjoin the suit at law till the bond and mortgage were exhausted in New Jersey, and it was held he was entitled to relief. The court held the law to be as above stated, and granted the relief solely on the ground that there was reasonable ground to believe that the bond and mortgage had been rendered frail and insecure by the illegal act of the holder of the note, and the court would not permit the surety to be forced to pay the money and then litigate this doubtful question with the maker of the bond and mortgage, as it was more equitable that the creditor should first litigate it.[1] Where principal and surety have both mortgaged property for the debt of the principal, the surety is entitled to have the property of the principal sold first to satisfy the debt.[2] When the principal is insolvent, the surety has, under certain circumstances, a right, before paying the debt, to file a bill to enforce a lien for its payment. This was held where a slave was sold under a decree of court and a lien retained for the purchase money, for which a surety also became bound, and the slave was levied on by other creditors:[3] Where land belonging to an estate was sold and a lien retained on it for the purchase money:[4] And where certain persons had in their hands funds belonging to a clerk of a court in his representative capacity.[5] Where a judgment had been rendered against principal and surety, and the principal was insolvent, it was held that a court of chancery would entertain jurisdiction of a suit brought by the surety for the purpose of reaching credits of the principal in the hands of third parties, and appropriating them in payment of the judgment, although the surety had not paid the debt.[6]

§ 205. **Surety may compel creditor to proceed against principal.**—It is settled by a long continued and unvarying current of authorities, that the surety may, by a suit in chancery, after the debt becomes due, and before he pays it, compel the creditor to

[1] Hayes *v.* Ward, 4 Johns. Ch. R. 123.

[2] Neimcewicz *v.* Gahn, 3 Paige Ch. R. 614; James *v.* Jacques, 26 Texas, 320.

[3] Henry *v.* Compton, 2 Head (Tenn.) 549.

[4] Polk *v.* Gallant, 2 Dev. & Bat. Eq. (Nor. Car.) 395. To same effect, see Green *v.* Crockett, 2 Dev. & Bat. Eq. 390; Arnold *v.* Hicks, 3 Ired. Eq. (Nor. Car.) 17; Egerton *v.* Alley, 6 Ired. Eq. (Nor. Car.) 188.

[5] Bunting *v.* Ricks, 2 Dev. & Bat. Eq. (Nor. Car.) 130.

[6] McConnell *v.* Scott, 15 Ohio, 401.

proceed to collect the debt from the principal, provided he indemnify the creditor against loss from a fruitless suit against the principal.[1] As the mere passive delay of the creditor in proceeding against the principal, however long continued and however injurious to the surety, will not ordinarily discharge him, this right to accelerate the movements of the creditor is of great importance. Even if the surety should suffer no injury by the delay, it is unreasonable that he should always have such a cloud as the debt of the principal hanging over him. It is likewise settled, that the surety may upon the terms of bringing the amount due into court, compel the creditor to prove the debt in bankruptcy against the estate of the principal.[2]

§ 206. **Cases holding that surety by request and without suit may compel creditor to proceed against principal.**—As to whether the surety may without suit accelerate the movements of the creditor against the principal there is great conflict of authority. There is a numerous and well considered class of authorities which hold that if, after the debt is due, the surety, verbally or in writing, request the creditor to sue the principal, who is then solvent, and the creditor fail to do so, and the principal afterwards becomes insolvent, the surety is thereby discharged. The reasoning upon which these decisions are founded is that equity will compel the creditor to sue the principal and make the money from him, because he is primarily liable for it, and it is the duty of the creditor to get payment from him if possible. If it is his duty to do this, there is no reason why he should not be compelled to do it upon the request of the surety *in pais*, as well as by filing a bill in chancery against him. Where the creditor does any act injurious to the surety, or omits to do an act when required which equity and his duty to the surety enjoin it upon him to do, and the omission is injurious to the surety, in either case the surety will be discharged. To delay under such circumstances is against conscience, and in its effect is a fraud upon the

[1] Ranelaugh *v.* Hays, 1 Vernon, 189; Hays *v.* Ward, 4 Johns. Ch. R. 123; Antrolus *v.* Davidson, 3 Merivale, 569-79; King *v.* Baldwin, 2 Johns Ch. R. 554; Lee *v.* Rook, Moseley, 318; Whitridge *v.* Durkee, 2 Md. Ch. R. 442; Nisbet *v.* Smith, 2 Brown Ch. Ca. 579; Hogaboom *v.* Herrick, 4 Vt. 131; Rees *v.* Berrington, 2 Ves. Jr. 540; Huey *v.* Pinney, 5 Minn. 310; Kent *v.* Matthews, 12 Leigh (Va.) 573; Rice *v.* Downing, 12 B. Mon. (Ky.) 44; *In re* Babcock, 3 Story, 393.

[2] Wright *v.* Simpson, 6 Vesey, 714; *Ex parte* Rushforth, 10 Vesey, 409; *In re* Babcock, 3 Story, 393.

surety.[1] The fact that there was a statute providing for the discharge of the surety, if the creditor failed to sue, upon being required in writing by the surety to do so, has been held to make no difference, the statute being held to be merely cumulative, and not to impair the right of a surety to be discharged upon a verbal request.[2] In order that the request may have this effect, the principal must, at the time thereof, be solvent and able to pay all his debts, according to the ordinary usage of trade.[3] The request need not be accompanied by an offer to pay the expenses of the suit, unless the creditor expressly puts his refusal to sue upon this ground.[4] If the creditor have a mortgage on property of the principal for the security of the debt, which is ample for that purpose when the debt becomes due, and refuse after request by the surety to foreclose the mortgage till the property greatly depreciates in value, it has been held that the surety is thereby discharged.[5] It has also been held that if the creditor, after request

[1] Pain v. Packard, 13 Johns. 174; King v. Baldwin, 17 Johns. 384, reversing the decision of Chancellor Kent, in King v. Baldwin, 2 Johns. Ch. R. 554, by the casting vote of Lieut. Gov. Taylor, a layman. The two first named cases are the leading authorities on the view of the subject which they hold. They have been followed, or decisons to the same effect, rendered in Manchester Iron Manf. Co. v. Sweeting, 10 Wend. 163; Hempstead v. Watkins, 6 Ark. (1 Eng.) 317; Martin v. Shekan, 2 Colorado, 614; Hancock v. Bryant, 2 Yerg. (Tenn.) 476; Cope v. Smith Exr. 8 Serg. & Rawle (Pa.) 110; Hopkins v. Spurlock, 2 Heisk. (Tenn.) 152; Thompson v. Watson, 10 Yerg. (Tenn.) 362; Colgrove v. Tallman, 67 N. Y. 95; Bruce v. Edwards, 1 Stew. (Ala.) 11. See Trimble v. Thorne, 16 Johns. 152, as to application of this principle to the indorser of a promissory note.

[2] Thompson v. Watson, 10 Yerg. (Tenn.) 362; Strader v. Houghton, 9 Port. (Ala.) 334; Herbert v. Hobbs, 3 Stew. (Ala.) 9; Goodman v. Griffin, 3 Stew. (Ala.) 160.

[3] Herrick v. Borst, 4 Hill (N.Y.) 650. To similar effect, see Huffman v. Hulbert, 13 Wend. 377; Merritt v. Lincoln, 21 Barb. 249; Field v. Cutler, 4 Lans. (N. Y.) 195.

[4] Wetzel v. Sponsler, 18 Pa. St. 460.

[5] Remsen v. Beekman, 25 New York, 552; where the doctrine of King v. Baldwin, although previously questioned by judges in the same State, was approved on principle, and followed as authority. If the principle of King v. Baldwin is correct, it would seem clear that the above decision is also correct. The precise opposite has, however, been held, in Branch Bank at Montgomery v. Perdue, 3 Ala. 409, and in Haden v. Brown, 18 Ala. 641, by a court which held the doctrine of King v. Baldwin. The same court held that after judgment against principal and sureties, the sureties were not discharged by the failure of the creditor, upon request, to levy on the property of the principal, and the subsequent insolvency of the principal: Buckalew v. Smith, 44 Ala. 638; and also that a lessor was not bound to distrain property of the lessee upon the request of the surety; the distinction seeming to be made between forcing the creditor

by the surety, fail to present his claim against the estate of an insolvent principal, and the debt is thereby lost, the surety is released *pro tanto*.[1] A guaranty given by the defendant was to be void if the plaintiff should omit to avail himself to the utmost of any security he held of R. He held a bill drawn by R, and accepted by an insolvent, still in prison. Held, he was not bound before suing on the guaranty to prosecute the insolvent.[2] A was indebted to B for one year's rent of certain premises, for which B had lost his landlord's lien, by lapse of time. A was also indebted to C for rent for the current year, for which C had a lien if he chose to enforce it, and for which last rent D was surety. The property of A was levied on by execution at the suit of third parties, and D notified C to file his claim for rent with the sheriff, by which the lien would have been preserved, and the debt made. C refused to do this, and the debt was lost. Held, the surety D was discharged.[3]

§ 207. **Requisites of the request to sue.**—The notice to the creditor to sue, which will discharge the surety if not complied with, should be so clear and distinct that the meaning of the surety can be at once apprehended without explanation or argument.[4] A request to "push (the surety) and keep pushing him," when it is understood by both parties to be a request to collect the debt by legal means, is sufficient. A request to collect the money by dunning or in any other way than by legal proceedings, is not sufficient.[5] A notice, by the surety in a note to the holder

to proceed generally, and forcing him to proceed in a particular way against particular property: Brooks *v.* Carter, 36 Ala. 682. To the same effect as the last case, see Ruggles *v.* Holden, 3 Wend. 216. It has also been held that a creditor is not bound, upon request, to arrest a principal who is insolvent, but had friends who would probably have paid the debt if he had been arrested: Warner *v.* Beardsley, 8 Wend. 194. It has been held by another court, that the creditor was not bound at the request of the surety to levy on property of the principal: Newell *v.* Hamer, 4 Howard (Miss.) 684. On this subject see, also, Bank *v.* Klingensmith, 7 Watts (Pa.) 523; Weiler *v.* Hoch, 25 Pa. St. 525; Baldwin *v.* Gordon, 12 Martin (La.) O. S. 378.

[1] McCollum *v.* Hinkley, 9 Vt. 143. The general doctrine of King *v.* Baldwin is repudiated by the same court: Hogaboom *v.* Herrick, 4 Vt. 131; Hickok *v.* Farmers' & Mechanics' Bank, 35 Vt. 476.

[2] Musket *v.* Rogers, 5 Bing. (N. C.) 728; *Id.* 8 Scott, 51.

[3] Lichtenthaler *v.* Thompson, 13 Serg. &. Rawle (Pa.) 157.

[4] Wolleshlare *v.* Searles, 45 Pa. St. 45; Shimer *v.* Jones, 47 Pa. St. 268; Conrad *v.* Foy, 68 Pa. St. 381.

[5] Singer *v.* Troutman, 49 Barb. (N. Y.) 182.

"to collect it, as he would not stand bail any longer," is sufficient.[1] It has been held that the request to sue must be accompanied by an explicit declaration that unless suit is brought the surety will no longer remain liable. Therefore, where a surety wrote to a creditor, as follows: "I therefore, notify you that I will be no longer considered bail. Please take another bond from him or payment," it was held the request was not sufficient.[2] The request to sue a note when due, avails nothing if made before the note is due. The request must be made at the time of, or after, the maturity of the obligation.[3] The surety may make the request by agent, and if he has a general agent who transacts all his business, it is the duty of such agent to make such request, without any special directions. Where the creditor is not in the neighborhood, and has left the note in the hands of an agent for collection, the request may be made of such agent.[4] The request may be made of the counsel of an absent or non-resident plaintiff in a judgment.[5] Where a married woman is the owner of a note, a request made of her husband to put the note in suit will not avail the surety. The husband is not *ipso facto* the agent of the wife in that regard.[6] It has been held that the request to sue would not avail the surety if the principal lived in another county.[7] But it has also been held that the surety might avail himself of such request when the principal lived in another State, but had property in the State in which the creditor resided, which might have been subjected to the payment of the debt.[8] Where the creditor has failed to sue upon request, it has been held that the burden of proof is on him to show, in a suit against the surety, that the money could not have been collected if suit had been brought against the principal when the request was made.[9]

§ 208. **Cases holding that the surety cannot, by request alone, accelerate the movements of the creditor against the principal.**—

[1] Stickler *v.* Burkholder, 47 Pa. St. 476.

[2] Greenawalt *v.* Kreider, 3 Pa. St. 264. To similar effect, see Erie Bank *v.* Gibson, 1 Watts (Pa.) 143.

[3] Hellen *v.* Crawford, 44 Pa. St. 105.

[4] Wetzel *v.* Sponslers' Exrs. 18 Pa. St. 460. See, also, on this point, Geddis *v.* Hawk, 10 Serg. & Rawle (Pa.) 33.

[5] Thomas *v.* Mann, 28 Pa. St. 520.

[6] Shimer *v.* Jones, 47 Pa. St. 268.

[7] Alcorn *v.* The Commonwealth, 66 Pa. St. 172.

[8] Hancock *v.* Bryant, 2 Yerg. (Tenn.) 476.

[9] Stickler *v.* Burkholder, 47 Pa. St. 476.

The great majority of cases on the subject hold, in the absence of any statutory provision, that if after the debt is due the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. The ground upon which these decisions rest is, that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal, he may himself pay the debt, and immediately sue the principal. The contrary doctrine is an innovation, and was unknown to the common law.[1] The surety on the bond of a note clerk of a bank was informed by the bank of an embezzlement committed by the clerk, and before paying any portion of the amount embezzled, requested the bank to cause the arrest of the clerk, which it refused to do: Held, the surety was not, in the absence of any indication of a fraudulent connivance at the escape of the clerk, discharged thereby.[2] Where the holder of two notes made by the same party commenced an action against him, declaring on the common counts for a greater sum than the aggregate of both notes, and attached property sufficient to satisfy both, but did not intend to include in the action one of the notes, which was signed by a surety, and there were subsequent attachments of the same property by other creditors, it was held that the plaintiff was not bound to comply with the request of the surety, to put into the action the note signed by him, even though he offered to indemnify the

[1] Jenkins *v.* Clarkson, 7 Ohio, 72; Carr *v.* Howard, 8 Blackf. (Ind.) 190; Halstead *v.* Brown, 17 Ind. 202; Exrs. of Dennis *v.* Rider, 2 McLean, 451; Davis *v.* Huggins, 3 New Hamp. 231; Pickett *v.* Land, 2 Bailey Law (So. Car.) 608; Nichols *v.* McDowell, 14 B. Mon. (Ky.) 5; Frye *v.* Barker, 4 Pick. 382; Stout *v.* Ashton, 5 T. B. Mon. (Ky.) 251; Gage *v.* Mechanics' Natl. Bk. of Chicago, 79 Ill. 62; Dillon *v.* Holmes, 5 Nebraska, 484; Inkster *v* First Natl. Bk. of Marshall, 30 Mich. 143; Langdon *v.* Markle, 48 Mo. 357; Hartman *v.* Burlingame, 9 Cal. 557; Dane *v.* Corduan. 24 Cal. 157; Hickok *v.* Farmers' & Mechanics' Bank, 35 Vt. 476; Hogaboom *v.* Herrick, 4 Vt. 131; Caston *v.* Dunlap, Richardson Eq.Cas. (So. Car.) 77; Croughton *v.* Duval, 3 Call (Va.) 69; Boutte *v.* Martin, 16 La. (Curry) 133; Taylor *v.* Beck, 13 Ill. 376. On same subject, see Huey *v.* Pinney, 5 Minn. 310; Bizzell *v.* Smith, 2 Dev. Eq. (Nor. Car.) 27; Thompson *v.* Bowne, 39 New Jer. Law (10 Vroom) 2; Hogshead *v.* Williams, 55 Ind. 145; Harris *v.* Newell, 42 Wis. 687; Pintard *v.* Davis, 1 Spencer (N. J.) 205; affirmed Pintard *v.* Davis, 1 Zabriskie (N. J.) 205.

[2] Louisiana State Bank *v.* Ledoux, 3 La. An. 674.

plaintiff for so doing.[1] Much may be said in favor of both views of this question concerning the right of the surety, by request and without suit, to accelerate the movements of the creditor against the principal. The objection that the rule permitting it is an innovation, might, with equal propriety, be urged against most of the causes which are now recognized as entitling the surety to his discharge. These causes are the outgrowth of equitable principles inherent in the relation of principal and surety; and several of the most important of them, which are now nowhere disputed, have been established by decisions of the courts during the present century. The rule under consideration was first announced by the Supreme Court of New York, in the year 1816, and is a doctrine recognized only by some of the American courts, no decisions to a similar effect having been made by the courts of England. Although repudiated by a majority of the courts of the United States, the rule is supported by strong equities, and is in harmony with the general well recognized rules governing the relation of principal and surety. Recognizing the justice and equity of this rule, the legislatures of many of the United States have, by statute, provided that the surety may, by notice, require the creditor to proceed against the principal.

§ 209. **Surety may make the same defense at law as in equity—Whether he must make his defense at law when sued at law.**—"The subject of equitable relief in behalf of sureties is one of original jurisdiction in a court of chancery. The peculiar rights of a surety originated in, and are exclusively the outgrowth of, equity. Formerly it was held in several instances that the remedy of the surety was only in equity, and could not be made available in courts of common law. But it is now held as a general rule, that the liability of sureties is governed by the same principles at law as in equity. And probably with few exceptions the same considerations which are sufficient in equity to discharge the surety, will be available for the same purpose at law."[2] On

[1] Adams Bank *v.* Anthony, 18 Pick. 238.

[2] Per Isham, J., in Viele *v.* Hoag, 24 Vt. 46. To same effect, see Heath *v.* Derry Bank, 44 New Hamp. 174; Samuell *v.* Howarth, 3 Merivale, 272; Baker *v.* Briggs, 8 Pick. 122; Rogers *v.* School Trustees, 46 Ill. 428; Watriss *v.* Pierce, 32 New Hamp. 560; State Bank *v.* Watkins, 6 Ark. (1 Eng.) 123; Smith *v.* Clopton, 48 Miss. 66; The People *v.* Jansen, 7 Johns. 332; Shelton *v.* Hurd, 7 Rhode Is. 403; Maxwell *v.* Connor, 1 Hill Eq. (So. Car.) 14; Wayne *v.* Kirby, 2 Bailey Law (So. Car.) 551; Springer *v.* Toothaker,

the ground that the surety can make the same defense at law that he can in equity, it has been held that when sued at law the surety must avail himself of such defenses as he can there make, and if he does not, that he cannot afterwards avail himself of such defenses in equity, unless he was prevented from so doing by fraud, accident or the wrongful act of the other party, without any negligence or other fault on his part.[1] On the other hand it has been held that if a surety when sued at law does not there make his defense, and judgment is recovered against him, he can afterwards come into equity and have relief. The reason is that the discharge of a surety was a matter of original equity jurisdiction, and the fact that courts of law now entertain jurisdiction of the matter, does not oust equity of its original jurisdiction. "Where the jurisdiction of courts of chancery and courts of law is concurrent in consequence of courts of law having enlarged their jurisdiction by their own acts, or of its having been enlarged by act of the legislature without prohibitory words, the party may make his election as to the tribunal in which he will make his defense."[2]

§ 210. **Whether surety having failed to make defense at law, can have relief in equity.**—It has been held that where there is no question that the defense of a surety can be made at law, then it must be made there, and the decision of that tribunal is conclusive. "But if it be doubtful whether a court of law can take cognizance of the defense, and there exists no doubt of the jurisdiction of a court of equity, and if in such a case a defendant at law under the influence of such doubt omits to make his defense, or if he bring it forward and it be overruled under the idea that it is not a defense at law, it is not granting a new trial for a court of equity to afford relief, notwithstanding the trial at law."[3] A surety being sued at law might have made his defense there, but

43 Me. 381; *Contra*, Exr. of McCall *v.* Admr. of Evans, 2 Brevard, (So. Car.) 3.

[1] Vilas *v.* Jones, 1 New York, 274; Schroeppell *v.* Shaw, 3 New York, 446; Ramsey *v.* Perley, 34 Ill. 504; Kenner *v.* Caldwell, Bailey Eq. Cas. (So. Car.) 149; Maxwell *v.* Connor, 1 Hill Eq. (So. Car.) 14; M'Grew *v.* Tombeckbee Bank, 5 Port (Ala.) 547; Herbert *v.* Hobbs, 3 Stew. (Ala.) 9; Dickerson *v.* Commissioners of Ripley Co. 6 Ind. 128.

[2] Hempstead *v.* Conway, 6 Ark. (1 Eng.) 317, per Oldham, J.; Wayland *v.* Tucker, 4 Gratt. (Va.) 267; Harlan *v.* Wingate, 2 J. J. Marsh (Ky.) 138. Smith *v.* Crease's Exr. 2 Cranch C. C. 481. On this subject, see, also, Sailly *v.* Elmore, 2 Paige Ch. R. 497.

[3] King *v.* Baldwin, 17 Johns. 384, per Spencer, C. J. To similar effect,

did not, and pending such suit filed a bill in chancery for discovery, and setting up his defense as surety, and it was held he was entitled to the relief sought by his bill.[1] It has been held, that if a surety is sued at law and makes an unsuccessful defense there, he cannot afterwards set up the same defense in equity.[2] But it has also been held, that if he sets up one defense at law and is unsuccessful in that he may afterwards set up another defense in equity.[3] Judgment was recovered against principal and surety, and the creditor afterwards gave time to the principal. The creditor afterwards sued the principal and the surety on the judgment, and the surety defended on the ground that the giving of time discharged him, but was unsuccessful in his defense, and judgment was rendered against him. He then filed a bill to restrain the second judgment at law, setting up the same matter of defense that he had urged at law, and it was held that he was entitled to relief. This was put upon the ground that after the first judgment at law, the relation of principal and surety was so far merged, that the surety could not make his defense at law.[4] Much of the confusion of the cases on this subject has arisen from the fact that originally most of the defenses of a surety had to be made in equity, and could not be set up as a defense to a suit at law and the rule permitting the same defense to be made at law that would avail the surety in equity, was adopted by various courts at different times, and is not even now fully recognized by all of them. Where the surety can and does make his defense at law, the great weight of authority is that the decision of the court of law is conclusive on him. The weight of authority also is that if he can make his defense at law, but does not, and judgment is rendered against him, he cannot afterwards have relief against such judgment on any ground which he might have relied on the suit at law. Where the case is such that a court of law will not entertain his defense, then if he had a good equitable defense, he will be relieved from the

see Rathbone v. Warren, 10 Johns. 587. It has, however, been held, that a party who failed to make his defense at law because he was advised and believed that he could not do so, could not afterwards have relief in equity; Dickerson v. Commissioners of Ripley County, 6 Ind. 128.

[1] Viele v. Hoag, 24 Vt. 46.

[2] Cooper v. Evans, Law Rep. 4 Eq. Cas. 45.

[3] Davies v. Stainbank, 6 De Gex. Macn. & Gor. 679.

[4] Dunham v. Downer, 31 Vt. 249.

judgment by a court of chancery. A sheriff received certain claims for collection, and collected them and paid the proceeds over to the person entitled to them, but did not take up his receipt given for the claims. The sheriff died, and his receipt came into the hands of the successor of the person who gave the claims to him for collection, and he sued the sureties of the sheriff for the amount of the claims, and recovered, and they paid the judgment. Afterwards, learning the facts, they filed a bill to have the money they had paid returned to them, and it was held that they, having been guilty of no *laches*, and not knowing of their defense when the judgment was rendered, were entitled to relief.[1]

§ 211. **If creditor lead a surety to believe debt is paid and surety is injured, he is discharged.**—If the creditor tells the surety that the debt is paid when in fact it is not, and the surety in consequence thereof releases a security or omits to secure himself, or is in any manner injured thereby, the surety is discharged.[2] And this is true, even though the creditor is honestly mistaken in the statement which he makes.[3] The creditor, having caused the injury, should suffer it. The same thing was held where the surety on a sealed note was given by the payee a release not under seal, and induced to believe for several years, and until the principal became insolvent, that he was discharged.[4] So, where, after joint judgment against principal and surety, the creditor, by his statements to the surety, led him to believe the debt was paid and he would not be troubled about it, and these statements were made under such circumstances as to justify the surety in believing and acting on them, and he was thereby induced to abstain from securing himself, when he might easily have done so, until the principal became insolvent, it was held he was discharged.[5] The surety on a note applied to the holder, and told him that if he had to pay the note he wished to do it soon, as he could then secure himself; to which the holder replied that he would look to the principal for payment and he need give himself no trouble about it. The surety took no steps in the matter,

[1] Hickman *v.* Hall, 5 Littell (Ky.) 338.

[2] Bank *v.* Haskell, 51 New Hamp. 116; High *v.* Cox, 55 Ga. 662; Waters *v.* Creagh, 4 Stew. & Por. (Ala.) 410; Thornburgh *v.* Marden, 33 Iowa, 380.

[3] Baker *v.* Briggs, 8 Pick. 122; Carpenter *v.* King, 9 Met. (Mass.) 511.

[4] Teague *v.* Russell, 2 Stew. (Ala.) 420.

[5] Roberts *v.* Miles, 12 Mich. 297; to similar effect, see White *v.* Walker, 31 Ill. 422.

but it did not appear that the principal became insolvent. Held, the surety was discharged.[1] The holder of a promissory note, believing it was paid in a trade he supposed he had made with the principal, so informed the surety, who knew nothing to the contrary for five years. It was not clear whether the circumstances of the principal had become better or worse. Held, the surety was discharged, and that it made no difference what the circumstances of the principal had become. The court said the language of the code was not only "injures the security," but also "exposes him to greater liability or increases his risk." The surety had a right to notify the creditor, or to pay the debt himself and sue the principal; he might have obtained additional security, etc. All these he was deprived of and lulled to sleep for five years. If the principal remained solvent, the creditor was not injured, but the surety was discharged.[2]

§ 212. **When surety not discharged although he believe debt is paid.**—If a note be delivered up to be canceled by mistake, and the payee before its maturity notify the makers of the mistake, and that he still looks to them for payment, it has been held that he may recover upon the note as well against the surety as against the principal, provided the surety has not prior to such notice, relying upon the surrender of the note, relinquished securities held by him for his indemnity, or been in some manner damnified.[3] Where a creditor told a surety that he considered the principal possessed of property sufficient to discharge the liability, that he had given or would give him time, that the principal would pay the debt, and that he did not want the surety any longer, it was held the surety was not discharged, there being no evidence that he relied on such representations or was injured thereby.[4] The same thing was held where the surety said to the creditor that he must make the debt out of the principal, and the creditor replied that he need put himself to no further trouble about the debt, as he had made a present of it to the principal, there being no evidence that the surety was injured thereby.[5] The holder of a note commenced suit on it, and levied an attachment on the property of the principal. The surety was informed

[1] Harris v. Brooks, 21 Pick. 195; to contrary effect, see Mahurin v. Pearson, 8 New Hamp. 539.

[2] Whitaker v. Kirby, 54 Ga. 277. On this subject, see Hogaboom v. Herrick, 4 Vt. 131; Bullard v. Ledbetter, 5 The Reporter (Sup. Ct. Ga.) 231.

[3] Blodgett v. Bickford, 30 (Vt.) 731.

[4] Brubaker v. Okeson, 36 Pa. St. 519.

[5] Driskell v. Mateer, 31 Mo. 325.

thereof, and in consequence neglected to secure himself. Afterwards the creditor dismissed the attachment suit and sued the surety. Held, the surety was not discharged, as the creditor made no agreement with, nor representation to, him that he would rely solely on the attachment or prosecute the suit.[1] Where the creditor knew that the surety was negotiating a loan for the principal, for the purpose of paying off therewith the debt for which the surety was liable, and the creditor promised the principal without consideration to give him further time, and the surety in consequence desisted from his attempt to raise the money, and the principal failed to pay the debt, it was held the surety was not discharged.[2] A having sent an order to B for certain goods, C agreed to guaranty payment to B upon an undertaking of D to indemnify C. B accordingly informed C that the goods were preparing, and afterwards shipped them to A without notifying C that they were shipped. Afterwards D desired to recall his indemnity, upon which C wrote to B to know whether he had executed the order, to which no answer was given by B for a considerable time, he having gone abroad in the interim. Upon this, C, supposing from the silence of B that the order was not executed, gave up his indemnity to D. Held, C was not discharged from his guaranty.[3]

§ 213. **Rights of surety against third persons—Indemnity of surety.**—The principal may, before the debt has been paid by the surety, confess a judgment in favor of the surety for his indemnity, and the lien of such judgment will be valid as against the creditors of the principal.[4] So a conveyance made by the principal to the surety, in consideration of an agreement by the surety to pay the debt, is valid as against the creditors of the principal.[5] The surety to whom a chattel has been mortgaged by the principal for his indemnity, may, before paying the debt, maintain trover against creditors of the principal who have taken and converted the chattel.[6] And in such case, one of three sureties has a right to recover damages if the property is of sufficient

[1] Barney *v.* Clark, 46 New Hamp. 514.

[2] Tucker *v.* Laing, 2 Kay & Johnson, 745.

[3] Oxley *v.* Young, 2 H Blackstone, 613.

[4] Miller *v.* Howry, 3 Pen. & Watts (Pa.) 374; Pringle *v.* Sizer, 2 Richardson, N. S. (So.Car.) 59; Tunnell *v.* Jefferson, 5 Harrington (Del.) 206.

[5] McWhorter *v.* Wright, 5 Ga. 555.

[6] Bellume *v.* Wallace, 2 Rich. Law (So. Car.) 80.

value, to the full extent of the debt for which he is liable, notwithstanding the fact that the consideration mentioned in the mortgage is only one-third of the debt.[1] Where property is mortgaged by the principal to a creditor to secure his debt, and the mortgage is also conditioned that such creditor shall indemnify a surety for any money which he may be obliged to pay to another creditor of the principal to whom such surety is liable, such condition will be enforced.[2] Where a surety has become bound, but has a right to withdraw from his obligation, an agreement for his indemnity, afterwards given by a third person in consideration of his remaining bound, is a valid contract, and the consideration is sufficient.[3] But where, after a surety had become bound, a third person, in consideration that he would remain bound an indefinite time, agreed in writing to indemnify him from loss, it was held that the agreement for indemnity was void for want of consideration, as the surety had assumed no liability beyond that which existed when the agreement for indemnity was made.[4] A surety who holds the written agreement of a third person, conditioned for his indemnity, does not waive such agreement by afterwards taking security for his indemnity from the principal.[5] The principals in a note agreed with their surety that if he would sign it, they would keep him indemnified by the use and application of a particular fund, as the surety might desire, or that they would secure him in any other way he might suggest. Held, this did not give the surety a lien on the particular fund, and it could not afterwards be assigned to him when the principal was in failing circumstances, so as to cut off other creditors. The surety having an option to take the particular fund or some other security, no lien was created.[6]

§ 214. **Surety entitled to benefit of collaterals—Creditor not bound to notify surety, when.**—Where bank bills have been received from the principal by the creditor as a collateral security for the debt, it lies on the creditor, in a suit against a surety for the same debt, to show what has been done with them.[7] A creditor who holds railroad bonds as collateral security, does not lose

[1] Barker *v.* Buel, 5 Cushing, 519.

[2] Rodes *v.* Crockett, 2 Yerg. (Tenn.) 346.

[3] Carroll *v.* Nixon, 4 Watts & Serg. (Pa.) 517; Carman *v.* Noble, 9 Pa. St. 366.

[4] Rix *v.* Adams, 9 Vt. 233.

[5] Drury *v.* Fay, 14 Pick. 326; generally on the subject of indemnity, see Seaver *v.* Young, 16 Vt. 658.

[6] Elliott *v.* Harris, 9 Bush (Ky.) 237.

[7] Spalding *v.* Bank, 9 Pa. St. 28.

his right to hold the bonds by suing the principal, and imprisoning him upon getting judgment. Nor does he waive his lien on such bonds if he promise, without consideration, to give them up.[1] Where the note of a stranger is received by a creditor from his debtor as collateral security for a debt, the creditor is not bound to notify the debtor of a proposition of the maker of the note to discharge it in property, though by a failure of the creditor to receive such property, the amount of the note is ultimately lost.[2] Where a submission to abitration is made by a written agreement, a surety in the agreement need not be notified of the sitting of the arbitrators. "The reasons for such notice are no stronger than they would be for notice to bail of the progress of the cause against the principal."[3] The payee of a note is not bound to notify one of several makers of a note who is a surety, of non-payment by the principal, and an agreement with the principal not to notify the surety, will not be such a fraudulent concealment as will discharge him. "If the plaintiff's not giving notice could not be fraudulent, could his agreement not to do it be so? Could his agreeing not to do what he was under no moral or legal obligation to do, be a fraudulent concealment. * An agreement not to inform, and an agreement to conceal, are two very different things."[4]

§ 215. **Surety not discharged because creditor tells him his signing is a mere matter of form—Other cases.**—Where the creditor has no security for his debt but the joint and several bond of sureties with their principal, he has a right to call upon any one of the sureties to pay it, and a court will not delay enforcing his claims until the several remedies against the other sureties may be exhausted.[5] Where the surety on a note given for property purchased at administrator's sale, when requested by the principal to sign it, was told by the payee that his signature was only wanted as a form to comply with the requirements of the ordinary, it was held that no fraud was thereby practiced on the surety which avoided the note as to him. The court said it was

[1] Smith v. Strout, 63 Me. 205. The surety has a right to insist that a collateral security shall be so applied as to relieve him; Kirkman v. Bank of America, 2 Cold. (Tenn.) 397.

[2] Rives v. McLosky, 5 Stew. & Port. (Ala.) 330.

[3] Farmer v. Stewart, 2 New Hamp. 97, per Woodbury, J.

[4] Grover v. Hoppock, 2 Dutcher (N. J.) 191, per Vredenburgh, J.

[5] Lowndes v. Pinckney, 2 Strob. Eq. (So. Car.) 44.

so common to say to a surety, when getting him to sign, that it was a mere matter of form, that it deceives no one.[1] Where the payee of a note merely advises the principal to carry his property to a better market out of the State, and sell it and pay his debts, and if unable to pay all to pay *pro rata*, it is not a fraud upon, and will not operate as a release of, the sureties on the note.[2] The deed or bond of a surety under seal for the simple contract debt of a principal, in which the principal does not join, does not, by operation of law, extinguish the simple contract debt of the principal.[3]

§ 216. **Surety may defend suit against principal—How liability of surety affected by fraud—Other cases.**—A surety has a right for his own protection to defend an action against his principal.[4] The holder of a mortgage assigned it with a guaranty that there was a certain amount due on it. The assignee in his own name sued the maker, and recovered a less amount than that guarantied to be due, and the guarantor made and desired to argue a motion for new trial, and told the assignee that unless he was allowed to argue the motion, he should consider himself discharged. The assignee stated that he did not want a new trial in the case, and refused to allow the guarantor to argue the motion, and judgment was thereupon entered for the smaller sum. It did not appear whether there was sufficient ground for a new trial, but the court said the guarantor had a right to argue the motion, and it was a valuable right of which the assignee would not be permitted to deprive him, and it was held that he was discharged.[5] A bond with surety was conditioned that a lessee would complete certain improvements on premises therein described within four years. Before the expiration of that time the lessor lawfully ejected the lessee from the premises. Held, the surety was not bound for the completion of the improvements, as the lessor had, although lawfully, prevented them from being completed.[6] Although the release of the principal in a bond may have been obtained by a fraud practiced by him upon the obligee, yet if the surety was not a party to the fraud, and the

[1] Smyley *v.* Head, 2 Rich. Law (So. Car.) 590.

[2] Hawkins *v.* Ridenhour, 13 Mo. 125.

[3] White *v.* Cuyler, 6 Durn. & East, 176.

[4] Jewett *v.* Crane, 35 Barb. (N. Y.) 208.

[5] Stark *v.* Fuller, 42 Pa. St. 320.

[6] Trustees of Section Sixteen *v.* Miller, 3 Ohio, 261.

obligee suffers several years to elapse without bringing suit or notifying the surety of the fraud, during which time the principal becomes insolvent, these circumstances will discharge the surety.[1] After a surety had in fact been discharged by time given the principal, the attorney of the principal represented to the surety that he was not discharged, and the surety relying thereon, deposited certain title deeds as security for the debt, and afterwards, in order to regain possession of such deeds gave certain notes. Held, the surety was not liable on such notes. The court said that money paid by mistake might be recovered back, and on the same principle the surety had a defense to the notes.[2] Where F was induced through fraudulent representations of the vendor to purchase a patent-right, and W was also induced thereby to deposit with the vendor a government bond as security that F would pay the purchase price, and the patent was worthless, and F repudiated the sale, it was held that W might recover the amount of the bond in an action against the vendor, and that his remedy was not alone against F, his principal.[3] Joint judgment having been recovered against principal and surety, the surety pointed out property which he said belonged to the principal and told the sheriff to levy on it, which he did, and it was sold to the creditor for the amount of the debt. Two years afterwards the surety released a mortgage which he held for his indemnity. The principal had in fact no title to the property sold, and became insolvent. Held, the surety was not discharged. He had not been misled and injured by the creditor, but on the contrary had misled and injured the creditor.[4]

§ 217. **When surety cannot recover back money paid by him to creditor—Party who is indebted may become surety, and secure suretyship debt to exclusion of other creditors—Other cases.**—If a surety, with full knowledge of facts which will discharge him, pays the debt, he cannot recover back the amount so paid from the creditor. He had a right to waive his defense, and by paying does so.[5] A surety who pays a judgment rendered by a court below against the principal, which is afterwards reversed on error

[1] Gordon *v.* McCarty, 3 Wharton (Pa.) 407; McCarty *v.* Gordon, 4 Wharton (Pa.) 321.

[2] Bristow *v.* Brown, 13 Irish Com. Law Rep. 201.

[3] Wile *v.* Wright, 32 Iowa, 451.

[4] Chambers *v.* Cochran, 18 Iowa, 159.

[5] Geary *v.* Gore Bank, 5 Grants' Ch. R. 536.

at the suit of the principal, cannot recover the amount so paid from the creditor. The payment, although in fact made by the surety, is in law a payment by the principal.[1] A surety who has paid the debt of the principal, cannot recover indemnity from a party who has agreed with the principal to pay the debt, there being no privity between the surety and such party.[2] Money was loaned to a corporation on its bond and mortgage, and the stockholders became individually liable as sureties for the repayment of the loan. Held, that other creditors of the corporation had no equity to compel the lender to exhaust his remedy against the sureties before resorting to the corporation for payment.[3] In consideration of an extension of time given to one firm, another firm executed a mortgage on its property to secure the debt. At that time the firm which executed the mortgage had creditors who afterwards filed a bill to set aside the mortgage as fraudulent against them. Held, they were not entitled to relief. The court said the mortgage was not voluntary, but was founded on a good consideration, viz: the extension of time to the principal debtor. A person or firm that is indebted, may become surety for another, the same as if such person or firm was not indebted, and such suretyship debt will be as valid as any other debt, and may be secured by the surety the same as any other debt.[4]

§ 218. **Surety may enforce trust made for his benefit without his knowledge—Other cases.**—Where a conveyance of land is made by absolute deed, and the grantee gives back to the grantor a written contract, promising to sell the land at a certain time, and to pay two notes with the proceeds, and to pay the balance to the grantor, such grantee holds the land in trust, and it is his duty to sell the same at the time specified, and apply the proceeds as provided by the contract; and if a third person be a surety on one of the notes, although he might not have known of the trust when it was undertaken, yet after he is informed of it, and can enforce its execution, the original parties to it cannot annul it, and he can enforce it in equity.[5] Real property was mortgaged by a debtor to his surety to indemnify him against his indorse-

[1] Garr v. Martin, 20 New York, 306.

[2] Hoffmann v. Schwaebe, 33 Barb. (N. Y.) 194.

[3] South Carolina Manf. Co. v. Bank, 6 Rich. Eq. (So. Car.) 227.

[4] Allen v. Morgan, 5 Humph. (Tenn.) 624. To a contrary effect, when the firm became surety for one of its members, see Kidder v. Page, 48 New Hamp. 380.

[5] Pratt v. Thornton, 28 Me. 355.

ments, and also to secure $3,000, due from the principal to the surety: Held, the creditors might, by suit in chancery, reach the property thus mortgaged, but the surety as to the $3,000, should share with the creditors *pro rata*.[1] Where the principal assigns a fund to trustees to pay a creditor whom the surety afterwards pays, and the proceeds of the fund are then paid over in money by the trustees to the administrator of the principal, the surety is entitled to the benefit of the fund, and may recover it from the administrator in an action in his own name for money had and received.[2] Where lands are conveyed to a trustee by the principal, to be sold for the benefit of his sureties, the sureties may bid and purchase at the trustees' sale the same as a stranger.[3] The creditors of a party resolved to accept a composition payable in three instalments, there being a surety for the payment of the third instalment. Before the resolution accepting the composition was passed, the debtor had agreed with the surety to indemnify him by depositing goods with him and this agreement was not made known to the creditors. After the resolutions were registered, the surety accepted bills of exchange for the amount of the third instalment of the composition, and certain goods were deposited with him by the principal. The principal paid the first instalment, but failed to pay the second, and thereupon filed a liquidation petition. Afterwards the surety paid the third instalment. Held, the agreement with the surety for indemnity was valid, and he was entitled to retain the goods as against the trustee, under the liquidation. The creditors had no specific lien on the property, and after the composition was accepted the principal might do as he pleased with it.[4] A became surety for B, who agreed orally to give A a mortgage on a house and lot for indemnity, and to insure the house for his benefit, which he did, the policy of insurance being payable to A. Afterwards, B sold the house and lot to C, who took it with a knowledge of the foregoing facts. C canceled the policy of insurance on the house and took out a new one, payable to himself. The house was burned, and it was held that A was entitled in equity to have the insurance money applied in exoneration of his liability for B.[5]

[1] New London Bank *v.* Lee, 11 Ct. 112.

[2] Miller *v.* Ord, 2 Binney (Pa.) 382.

[3] Landis *v.* Curd, 63 Mo. 104.

[4] *Ex parte* Burrell *In re* Robinson, Law Rep. 1 Chancery Div. 537.

[5] Miller *v.* Aldrich, 31 Mich. 408.

It has been held that the principal, or if he be dead, his personal representative, is a necessary party to suit in chancery against the surety on a lost note.[1] It has also been held that the cashier of a bank has no authority, by virtue of his office, to release a surety upon a negotiable instrument held by the bank, unless he is officially empowered so to do.[2]

§ 219. **When surety for a portion of a debt entitled to share in dividend of estate of insolvent principal—Other cases.**—If a party gives a guaranty in which his liability is limited to a specified sum, to secure to that extent any floating balance which may become due the creditor from the principal, and the principal becomes insolvent, owing the creditor more than the amount limited in the guaranty, such guarantor is entitled to share in the dividend, out of the estate of the principal, where there is not enough of such estate to pay the balance, above the amount of the guaranty due the creditor.[3] But if the intention is to guaranty the whole debt to the extent of the amount mentioned in the guaranty, then the guarantor is not entitled to a share in such dividend. Upon this subject the court said it was a mere question of construction of the guaranty, and proceeded: "The class of cases referred to, do not lay down any general doctrine that where there is a surety, with a limit on the amount of his liability for the whole debt exceeding that limit, he is entitled to the benefit of a ratable proportion of the dividends paid on the whole debt; but only that where the surety has given a continuing guaranty, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guaranty is as between the surety and the creditor, to be construed both at law and in equity, as applicable to a part only of the debt, co-extensive with the amount of his guaranty, and this upon the ground at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance, or not to increase it, at the expense of the surety."[4]

[1] Greathouse v. Hord, 1 Dana (Ky.) 105.

[2] Daviess Co. Sav. Ass'n v. Sailor, 63 Mo. 24; Merchants Bank v. Rudolf, 5 Nebraska, 527. These two cases do not agree as to whether the surety is discharged by representations made by the cashier to the surety that the debt is paid. As to the power of an attorney at law, by virtue of his office, to do acts which will discharge a surety, see Givens v. Briscoe, 3 J. J. Marsh (Ky.) 529.

[3] Hobson v. Bass, Law Rep. 6 Chancery Appl. Cas. 792.

[4] Ellis v. Emmanuel, Law Rep. 1 Exch. Div. 157, per Blackburn, J.

It has been held, that upon the insolvency of the principal, a surety is considered in equity as a creditor, and may retain against an assignee for value, and without notice, any funds of the principal which he has in his hands.[1] But where an attachment act provided that if the debtor was "truly indebted" to the person in whose hands the property was at the time of the service of the attachment writ, such person might retain it to pay his debt, and an attachment was levied on property of the principal, in the hands of a surety, which had not been pledged to the surety, for his indemnity, and the surety had not then paid the debt, it was held, the surety could not retain the property.[2]

[1] Battle *v.* Hart, 2 Dev. Eq. (Nor. Car.) 31.

[2] Yongue *v.* Linton, 6 Rich. Law (So. Car.) 275.

CHAPTER XI.

OF THE RIGHTS OF SURETIES AND GUARANTORS BETWEEN EACH OTHER—CONTRIBUTION.

§ 220. **The right to contribution subsists between co-sureties —Reasons upon which it is founded.**—The principal question which arises between co-sureties, is that of contribution. The right to contribution results from the maxim that equality is equity. The creditor may collect all the debt from the principal or any one of several sureties, or he may collect from every surety his proper proportion. If, having this right, he collects it all from one surety, the law clothes such surety with the same power, and enables him to enforce contribution. "Natural justice says that one surety having become so with other sureties, shall not have the whole debt thrown upon him by the choice of the creditor, in not resorting to remedies in his power, without having contribution from those who entered into the obligation equally with him. The obligation of co-sureties to contribute to each other is not founded in contract between them, but stood upon a principle of equity until that principle of equity had been so long and so generally acknowledged, that courts of law in modern times have assumed jurisdiction. This jurisdiction of the courts of common law is based upon the idea that the equitable principle had been so long and so generally acknowledged and enforced,

that persons in placing themselves under circumstances to which it applies, may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time equity exercised its jurisdiction exclusively and individually; the jurisdiction assumed by courts of law is comparatively of very modern date.[1] It has also been said that "This right to contribution has been considered as depending rather upon a principle of equity than upon contract; but it may well be considered as resting alike on both for its foundation; for although generally there is no express agreement entered into between joint sureties, yet from the uniform and almost universal understanding which seems to pervade the whole community, that from the circumstance alone of their agreeing to be, and becoming accordingly co-sureties of the principal, they mutually become bound to each other to divide and equalize any loss that may arise therefrom to each other, or any of them, it may with great propriety be said that there is at least an implied contract."[2]

§ 221. **Co-sureties bound by different instruments liable to contribution.**—Co-sureties are liable to contribution, but sureties for the same principal who are not co-sureties are not so liable. Much of the learning on this subject is devoted to who are and who are not co-sureties. Where all the sureties sign the same instrument and become equally bound thereby, they are of course co-sureties and liable to contribute to each other. So, also, when several sureties become bound for the debt, default or miscarriage of the same principal, with reference to the same transaction, even though they become bound by different instruments, at different times and for different amounts, they are generally considered co-sureties and held liable to contribution. In the leading case on this subject the principal was receiver of the fines and forfeitures of the customs of the outports, and to secure the performance of his duties gave three separate bonds in the same penalty, but signed by different sureties. It was held that the sureties in the three bonds were liable to each other for contribution. The court said: "If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. * In the particular case of sureties, it is admitted that one surety may compel another to con-

[1] Lansdale *v.* Cox, 7 T. B. Mon. (Ky.) 401, per Bibb, C. J.

[2] Agnew *v.* Bell, 4 Watts (Pa.) 31, per Kennedy, J.

tribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burthen. They are bound as effectually *quoad* contribution as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they are all joined in the same engagement, they must all contribute equally."[1]

§ 222. **Instances where sureties bound by different instruments held liable to contribution.**—Where an administrator upon assuming the duties of his office, gave bond with sureties, and eight years afterwards, upon being required to do so, gave an additional bond with other sureties, it was held that the sureties on both bonds were liable to contribute to each other.[2] The same thing was held, where an injunction was issued upon a bond given with one surety, which surety was held to be insufficient, and a new bond was given with two other sureties.[3] Where a sheriff had been required, under an act of the legislature, to procure additional security, and had at different times entered into new bonds with new sureties, it was held that all the sureties on all the bonds were liable to contribution.[4] Execution was taken out against D as principal, and A and B as sureties, and levied on the goods of D, who gave a forthcoming bond, in which A, B and E were bound as sureties for D. Execution was issued on the forthcoming bond, and E was compelled to pay the debt. Held, E was co-surety with A and B, and not a surety for them, and could recover contribution from them as co-sureties, but not full indemnity, as if they were principals.[5] A bond was executed by A as principal, and B and C as sureties, with the stipulation that the sureties should not be discharged by any new arrangement between the creditor and the principal. B compounded with his creditors. The bond became due and payable, and the cred-

[1] Deering *v.* The Earl of Winchelsea, 2 Bos. & Pul. 270, per Eyre, C. B.; *Id.* 1 Cox, 318. See, also, Mayhew *v.* Crickett, 2 Swanston, 193; Breckinridge *v.* Taylor, 5 Dana (Ky.) 110.

[2] Cobb *v.* Haynes, 8 B. Mon. (Ky.) 137; the same thing was held, where a guardian under similar circumstances gave two bonds; Bell's Admr. *v.* Jasper, 2 Ired. Eq. (Nor. Car.) 597.

[3] Bentley *v.* Harris' Admr. 2 Gratt. (Va.) 358.

[4] Harris *v.* Ferguson, 2 Bailey Law (So. Car.) 397.

[5] Perrins *v.* Ragland, 5 Leigh (Va.) 552.

itor threatening to sue unless A got another surety in place of B, one D, by a separate writing, became liable for the whole amount of the bond, "according to the tenor thereof." D was compelled to pay the bond, and it was held he was entitled to contribution from C. The court said that D became surety for the same debt for which C was surety, "and in that case, in whatever way he became surety, if the other surety is called on to pay, he must contribute."[1] In another case, A and B as principals, gave a note to C, with D as surety thereon. C sold and indorsed the note to E. To obtain further time, A and B proposed to give a new note with D and F as sureties. E declined to give up the old note or receive the new one in its stead, unless C would become a party to the new note, and C thereupon signed it, adding after his name the words "as security." Held, that C, D and F were co-sureties, and that D, who had paid the note, was entitled to contribution from C and F. The court said that: "Whenever several persons are sureties bound for the same duty, they stand in the relation of co-sureties, and are liable to contribution. * Nor will their becoming sureties at different times, without the knowledge of each other, or even by different instruments, affect their obligation."[2]

§ 223. **It makes no difference with the right to contribution, that one surety does not know that another became bound as such.**— As the right to contribution results from equitable principles, and not from express contract, such right is not at all affected by the fact that the surety seeking contribution, or from whom it is sought, had no knowledge that the other had assumed the obligation of a surety for the same thing. Thus it has been held that a surety, who becomes such without the knowledge of one who is already bound and pays the debt, may recover contribution from the first surety.[3] A as principal, and B and C, as sureties, signed a note, but the fact of suretyship did not appear therefrom. The holder afterwards became dissatisfied with the solvency of the signers of the note, and A procured D to sign the note under the names of the other signers thereof, upon a

[1] Whiting v. Burke, Law Rep. 6 Ch. Appl. Cas. 342, per James, L. J.; affirming, Whiting v. Burke, Law Rep. 10 Eq. Cas. 539.

[2] Woodworth v. Bowes, 5 Ind. (3 Port.) 276, per Stuart, J.

[3] Chaffee v. Jones, 19 Pick. 260. Holding that no agreement is necessary to entitle sureties who sign a note at different times to contribution from each other; see Warner v. Morrison, 3 Allen, 566.

consideration moving from A to D. Afterwards A became insolvent, and C was obliged to pay the note. Held, he was entitled to contribution from D. The court said that the right to contribution exists only among those sureties who are liable for the same thing. But equity looks at substance more than form, and if several persons enter into contracts of suretyship, which are the same in their legal character and operation, though by different instruments, at different times, and without the knowledge of each other, they will be bound to mutual contribution.[1] In another case, A, B and C signed a note, B and C being sureties, but that fact not appearing from the note, A, being in possession of the note, asked D to sign it, telling him B and C were principals. D thereupon signed it, adding after his name the word "surety." D was obliged to pay the note, and it was held that he could recover contribution from B and C as co-sureties, but could not recover indemnity from them as principals.[2]

§ 224. **When sureties for the same debt not liable to contribution—Instances.**—Where, after principal and surety had signed a note, a third party also signed it, and added to his signature the words "surety for the above parties," it was held that such third party was not a co-surety with the first surety, and was not liable to him for contribution. The Court said: "The defendant had a right to qualify his contract, as he pleased, consistent with the rules of law. He refused to sign as a co-surety with the other sureties, but did sign as surety for the whole, in which there was certainly nothing unlawful."[3] It has been held that, "where separate bonds are given with different sureties, and one is intended to be subsidiary to, and a security for the other in case of default in the payment of the latter, the sureties in the second bond would not be compellable to aid those in the first bond by contribution."[4] Where several sureties became bound by separate bonds for the same amount on account of one principal to the same creditor, but the amount of all the bonds did not equal the

[1] Monson v. Drakeley, 40 Ct. 552.

[2] Whitehouse v. Hanson, 42 New Hamp. 9; to similar effect, see Norton v. Coons, 3 Denio, 130; see, also, Warner v. Price, 3 Wend. 397; McNeil v. Sanford, 3 B. Mon. (Ky.) 11; Beaman v. Blanchard, 4 Wend. 432; *contra*, Hunt v. Chambliss, 7 Smedes & Mar. (Miss.) 532; Keith v. Goodwin, 31 Vt. 268.

[3] Harris v. Warner, 13 Wend. 400, per Nelson, J.

[4] Salyers v. Ross, 15 Ind. 130, per Davison, J. To similar effect, see Whitman v. Gaddie, 7 B. Mon. (Ky.) 591.

sum due from the principal to the creditor, it was held that every surety being bound for an individual sum, they were not co-sureties, and there was no right to contribution between them.[1] A being indebted to B in 1200*l.*, C, D and E, each separately, agreed to become A's surety by a separate instrument for 400*l.* C and D each executed a separate instrument with A, to B, in the sum of 400*l.*, but E would not execute any instrument. C, being sued, claimed to be discharged, because E had not executed an instrument as agreed. The Lord Chancellor thought the agreements of C, D and E to become sureties had no connection with each other, and if E had executed the instrument, as agreed, he would not have been co-surety with C, and C was, therefore, not discharged.[2] In another case, A borrowed money on a mortgage of his estates D and S, to which B, a prior incumbrancer on estate D, and C, a prior incumbrancer on estate S, were parties, and consented to give the mortgage priority over their respective charges, but it was stated in the mortgage that they joined for no other purpose. The lands were subsequently sold, and the mortgage paid out of the joint proceeds. The residue of the fund produced by the sale of estate S was not sufficient to pay C's incumbrance. Held, C was not entitled to contribution against B, there not having been any common liability to pay a common demand. The Court said: "The foundation of the right (to contribution) is * a common liability for a demand upon the parties in common. Now, in the present case, there is no common liability for a common demand. Each party agreed upon his own behalf to postpone his own particular charge. It has so turned out, that by reason of a deficient fund, there is not sufficient to pay all the charges, and, therefore, the parties giving priority have lost their respective charges. But where is the common liability for the same demand? There being no common liability, there is no foundation for any equities among themselves."[3]

§ 225. **When accommodation parties to negotiable instruments are co-sureties.**—The weight of authority is, that successive accommodation indorsers of negotiable instruments are not, in the absence of an agreement to that effect, co-sureties, nor liable to contribution as between each other.[4] To constitute the

[1] Pendlebury *v.* Walker, 4 Younge & Coll. (Exch.) 424.

[2] Coope *v.* Twynam, 1 Turner & Russ, 426, per Lord Eldon.

[3] *In re* Keily, 9 Irish Ch. R. 87, per Brady, C.

[4] Sherrod *v.* Rhodes, 5 Ala. 683; McCarty *v.* Roots, 21 Howard (U. S.)

relation of co-sureties between such indorsers, there must be an agreement to that effect between them, or some fact or circumstance must exist from which such an agreement can be inferred. If a binding agreement to that effect is established, such indorsers will be held liable to contribution as co-sureties. But it has been held that such an agreement made between such indorsers after they have signed, and without any new consideration, is not binding. And where, after a note was due, the first and second indorsers wrote a letter to the creditor, stating they were jointly liable, and asking for time, it was held that this did not render them co-sureties.[1] It has been held that the accommodation indorser of a note is not, in the absence of an agreement to that effect, liable as co-surety with a surety who signed the note on its face, as maker.[2] So it has been held that a stranger who, in terms, guaranties a note on its back is not, in the absence of an agreement to that effect, a co-surety with a surety who had previously signed it on its face.[3] A, for the purpose of raising money for himself, drew a bill on B, which B accepted for A's accommodation. Being unable to get the bill discounted without a third name, A procured C to indorse it. The bill being unpaid at maturity, the holder agreed to renew it, and accordingly a new bill was drawn by B upon A, and indorsed by C: Held, that B, who had the bill to pay, was entitled to contribution from C.[4] It has been held that the mere fact that one party drew and another indorsed a bill of exchange for the sole accommodation of another, did not establish the fact that they were co-sureties, but it might be shown by parol that they were co-sureties.[5] *Prima facie*, an indorser of a promissory note is not a co-surety with a surety who signs the note as maker, but it may be shown by parol evidence that they were, in fact, co-sureties.[6]

§ 226. **The true relation between several sureties may be shown by parol evidence.**—It is a general rule that the true re-

432; McCune v. Belt, 45 Mo. 174; Stillwell v. How, 46 Mo. 589. To contrary effect, see Lanson v. Paxton, 22 Up. Can. C. P. R. 505; Daniel v. McRae, 2 Hawks (Nor. Car.) 590; Richards v. Simms, 1 Dev. & Batt. Law (Nor. Dar.) 48.

[1] Cathcart v. Gibson, 1 Richardson Law (So. Car.) 10. See, also, on this point, Dunn v. Wade, 23 Mo. 207.

[2] Smith v. Smith, 1 Devereux, Eq. (Nor. Car.) 173; Briggs v. Boyd, 37 Vt. 534; Dawson v. Pettway, 4 Dev. & Batt. Law (Nor. Car.) 396.

[3] Longley v. Griggs, 10 Pick. 121.

[4] Reynolds v. Wheeler, 10 J. Scott (N. S.) 561.

[5] Dunn v. Sparks, 7 Ind. 490.

[6] Nurre v. Chittenden, 56 Ind. 462.

lation subsisting between the several parties bound for the performance of a written obligation, may be shown by parol evidence. An unwritten agreement made between such parties prior to, or contemporaneously with, their executing an instrument as sureties, by which one promises to indemnify the other from loss, may be proved by parol, and the surety who made the agreement cannot, in such case, recover contribution from the other.[1] In such a case the Court said: "The legal effect of a written contract is as much within the protection of the rule which forbids the introduction of parol evidence, as its language. * But we think it is limited to the stipulations between the parties actually contracting with each other by the written instrument." The liability to contribution does not arise from contract, but from equitable principles. There is no agreement between the sureties contained in the obligation signed by them. The agreement is between the obligors and the obligee. As between the various sureties there is no written agreement; there is only an equitable presumption raised by the fact of payment, that the sureties ought to contribute equally for the default of the principal. This equity can be rebutted by parol.[2] Where several parties sign an obligation, and one of them adds after his name the word "surety," it may be shown by parol he is surety for, or co-surety with, the other. The word "surety" indicates that he is surety for somebody, but does not show for whom.[3] It is competent for one of two sureties on a promissory note, to prove by parol that he signed as surety, both of his principal and the other surety, and on an undertaking by the other surety to indemnify him. The Court in deciding such a case said: "It is not offering parol evidence to vary or explain the written contract; it was a collateral contract, independent of, and consistent with, it. The law regards all joint signers of an obligation as principals. It is by assuming an equitable jurisdiction that evidence is admitted of some of the parties having signed as

[1] Craythorne v. Swinburne, 14 Vesey, 160; Hunt v. Chambliss, 7 Smedes & Mar. (Miss.) 532; Rae v. Rae, 6 Irish Ch. R. 490. To contrary effect, see Norton v. Coons, 6 New York, 33.

[2] Barry v. Ransom, 12 New York, 462, per Dennis and Dean JJ. To same effect, see Paulin v. Kaighn, 3 Dutcher (N. J.) 503.

[3] Robinson v. Lyle, 10 Barb. (N. Y.) 512; Adams v. Flanagan, 36 Vt. 400. See, also, on this point, Fernald v. Dawley, 26 Me. 470; Crosby v. Wyatt, 23 Me. 156.

sureties, and there is nothing to forbid the further evidence of their having fixed and arranged their respective liabilities as between themselves by their own contract."[1] The surety on the face of a note, and an accommodation indorser may, as between themselves, be shown by parol to be co-sureties by virtue of a verbal understanding to that effect.[2] So several successive accommodation indorsers of a negotiable instrument may be shown by parol to be co-sureties.[3] In an action by one surety against another for contribution, parol evidence of the payment made by the plaintiff, is admissible and sufficient, notwithstanding it was made upon an execution, which is not produced, issued on a judgment against the principal and sureties.[4]

§ 227. **Surety who becomes bound during course of remedy against principal, not co-surety with original surety.**—A surety who becomes bound for a debt during the course of legal proceedings against the principal for the collection of the same, is not a co-surety with the original surety for the debt, nor entitled to contribution from him, and if such original surety afterwards has to pay the debt, he is entitled to subrogation to the creditor's rights against such subsequent surety, and may collect the whole amount that he has paid from such subsequent surety. Where a judgment was recovered against principal and surety, and the principal alone appealed, giving a different surety on the appeal bond, and the judgment was affirmed, and was paid by the surety in the appeal bond, it was held that he could not recover contribution from the original surety.[5] Judgment was rendered against A and B in the County Court, and they appealed to the Circuit Court, giving C as surety on the appeal bond. Judgment was rendered against all three of them in the Circuit Court, and they all appealed to the Supreme Court, and gave an appeal bond as principals, with D as their surety. The judgment was affirmed in the Supreme Court, and was paid by C.: Held, C could not recover contribution from D.[6] If, after separate judgments are

[1] Anderson *v.* Pearson, 2 Baily Law (So. Car.) 107.

[2] Harshman *v.* Armstrong, 43 Ind. 126.

[3] Clapp *v.* Rice, 13 Gray, 403; Smith *v.* Morrill 54 Me. 48.

[4] Hayden *v.* Rice, 18 Vt. 353.

[5] Chaffin *v.* Campbell, 4 Sneed (Tenn.) 184.

[6] Cowan *v.* Duncan, Meigs (Tenn.) 470. To a similar effect, in the case of sureties on a supersedeas and stay bond, see Smith's Exrs. *v.* Anderson, 18 Md. 520; Kellar *v.* Williams, 10 Bush (Ky.) 216.

obtained against principal and surety, a third person interposes and gives his note for the debt to obtain a stay of execution, and judgment is obtained on the note, and then the first surety is obliged to pay the debt, he is entitled to have an assignment of the judgment on the note of such third person, to indemnify him for such payment. The surety is entitled to subrogation to every security which the creditor obtains for the payment of the debt. The second "surety stipulating at the instance of the principal to pay the debt, suffers no absolute injustice in being obliged to do so, since he is compelled to perform no more than he undertook, and has no right to complain that he is not allowed to use as payment by himself, the money which proceeds from another person whom his principal was previously bound to save harmless. * It is sufficient that it is settled that if the interposition of the second surety may have been the means of involving the first in the ultimate liability to pay, the equity of the first surety decidedly preponderates."[1] An execution was issued against a principal and sureties, and the principal alone obtained an injunction to stay the judgment, and gave an injunction bond with a different surety. The surety in the injunction bond having been compelled to pay the judgment, it was held that he could not recover contribution from the original sureties. Without their solicitation he had prolonged their liability, by preventing the money being made out of their principal, as it would have been but for his interference. To make them contribute would be grossly inequitable.[2] Judgment was recovered against a principal and sureties, and execution was levied on the property of one of the sureties, who executed a forthcoming bond with another of the sureties (whose property had not been levied on), as his surety in the forthcoming bond, and the bond was forfeited. The surety in the forthcoming bond paid the debt, and it was held that he was entitled to contribution from all the sureties for the debt.[3] It has been held, that where judgment is recovered against one surety, the suing out a writ of error to the Supreme Court by him and giving bond for its prosecution, does destroy

[1] Pott v. Nathans, 1 Watts & Serg. (Pa.) 155, per Sargent, J.; Clay v. Schnitzell, 5 Phila. (Pa.) 441; Schnitzell's appeal, 49 Pa. St. 23. Holding the same thing in the case of an original surety and a surety on an appeal bond, see Mitchell v. De Witt, 25 Texas (Supplement) 180.

[2] Brandenburg v. Flynn's Exr. 12 B. Mon. (Ky.) 397; Bohannon v. Combs, 12 B. Mon. (Ky.) 563.

[3] Preston v. Preston, 4 Gratt. (Va.) 88.

his right to contribution from a co-surety bound with him for the debt on which the judgment was recovered.[1]

§ 228. **Contribution cannot be recovered when it would be inequitable.**—As the right to contribution between co-sureties is founded on equitable principles, contribution will not be enforced between them when it would be inequitable. Thus, two parties, A and B, were sureties of C. On one occasion, when some of C's land was being sold, he endeavored to stifle competition at the sale, and the land was sold to B for more than as much less than it was worth as A and B were liable for as sureties. Afterwards B had the debt to pay, and in a suit by him for contribution, it was held that he either bought and held the land for C, or bought it for himself by C's efforts, at enough less than it was worth to indemnify him, and he was not entitled to contribution from A. The court said: "The right to contribution amongst sureties rests not in contract, but in natural equity. * If a party base his right to recover upon principles of natural equity, the defendant may appeal to the same principles in his defense."[2] A, B and C were sureties for D in a bond, and judgment was recovered against A, B and D, but not against C. Execution was sued out and levied on the property of D, who gave a forthcoming bond, in which A, B, and a third party joined as sureties. Execution was awarded on the forthcoming bond, and levied on the property of A. Held, he could not recover contribution from C. The money would have been made from the property of the principal if the last bond had not been given, and it was inequitable that C should suffer by the giving of such bond.[3] So, where A, B and C were co-sureties, and judgment was recovered against them all, and execution was levied on property of A, who gave a forthcoming bond, with B as surety, and this bond was forfeited and the property lost, and A became insolvent, and B paid the debt, it was held that B could only recover from C, as contribution, one-third of the amount paid by him, instead of one-half, which he would otherwise have been entitled to recover.[4] Where property is conveyed to a trustee, to indemnify a surety for various

[1] John v. Jones, 16 Ala. 454.

[2] Dennis v. Gillespie, 24 Miss. 581, per Fisher, J. For a special case on this subject, see McGehee v. McGehee, 12 Ala. 83. See, also, Wells v. Miller, 66 New York, 255.

[3] Langford's Exr. v. Perrin, 5 Leigh (Va.) 552.

[4] Preston v. Preston, 4 Gratt. (Va.), 88.

indorsements, and by agreement between the principal and surety, the property is sold in a certain way, and in consideration thereof the surety agrees to pay all the debts of the principal, for which he is bound as surety, and does pay a debt contemplated by the agreement, on which there is a co-surety, he cannot recover contribution from such co-surety.[1]

§ 229. **When surety, who becomes liable at the request of another surety, not liable to contribution.**—If one surety in order to induce another to become bound as surety, agrees to indemnify him from all loss which he may suffer in consequence thereof, such an agreement is valid and will be enforced.[2] The weight of authority is, also, that if one surety becomes bound at and solely because of the request of another surety, even though there be no express agreement on the part of the latter to indemnify the former, yet the surety making the request, if he is compelled to pay the debt, cannot recover contribution from the surety who signed in consequence of such request. With reference to this it has been said: "Where one has been induced to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretense for saying that he shall be liable to be called upon by the person at whose request he entered into the security."[3] If, however, a surety becomes bound at the request of the principal, coupled with the request of another surety, it has been held that he is liable for contribution to the surety who joins with the principal in making the request.[4] It has also been held that the mere fact that one surety became such at the request of another, did not release the former from liability to contribute to the latter. This was in one case put on the ground that there was an implied contract between co-sureties to contribute, and a simple request by one to the other to become surety was not sufficient to rebut the presumption of such implied contract.[5] As already seen, the right to contribution results from equitable principles, and contribution will not in the absence of express contract be enforced contrary to equity. It may

[1] John *v.* Jones, 16 Ala. 454.

[2] Jones *v.* Letcher, 13 B. Mon. (Ky.) 363.

[3] Turner *v.* Davies, 2 Esp. 478, per Lord Kenyon; Cutter *v.* Emery, 37 New Hamp. 567; Byers *v.* McClanahan, 6 Gill & Johns. (Md.) 250; Daniel *v.* Ballard, 2 Dana (Ky.) 296.

[4] Hendricks *v.* Whittemore, 105 Mass. 23.

[5] Bagott *v.* Mullen, 32 Ind. 332; McKee *v.* Campbell, 27 Mich. 497.

well be said that it would be inequitable to compel the party who became bound at the request of another, to contribute to that other, if a loss is sustained in consequence of the assumption of such liability.

§ 230. **Surety of surety not liable to contribution.**—The surety of a surety is not generally liable to contribution at the suit of the party for whom he is surety. Thus, the plaintiff signed a note as surety, upon the erroneous supposition springing from the deceit and falsehood of the principal, and in no way imputable to the defendants, that the defendants would sign as co-sureties with him. Afterwards the defendants, in good faith and without any knowledge of what the plaintiff supposed as to their signing, signed the note, upon the distinct understanding with the principal and the payee that they signed as sureties for the plaintiff and other previous signers, and not as co-sureties with the plaintiff. Held, they did not thereby become co-sureties with the plaintiff, nor were they liable to him for contribution.[1] Where, after certain sureties had signed a note, another signed it, and added to his name the words "security to above," it was held that the first sureties could not recover contribution from the latter unless it was made satisfactorily to appear that he intended to become co-surety with them.[2] A being indebted, and the creditor pressing for payment, an application was made by B to a bank, which advanced the money on two bonds, one of which was signed by A as principal and C as surety. The other bond recited the first one, and the advance of the money to A and C at the request of B, and was conditioned to be void if A and C, or either of them, paid the first bond. It was understood by parol between B and the bank that he was not to be liable unless both A and C failed to pay, and that he was not a co-surety with either of them. Held, that C, upon paying the debt could not recover contribution from B. The court said that B "might limit his engagement with reference to them as he thought proper, and the bond upon the face of it makes him surety only for the principal and the other surety."[3] Where A, the surety in an undertaking

[1] Adams v. Flanagan, 36 Vt. 400.

[2] Thompson v. Sanders, 4 Dev. & Bat. Law (Nor. Car.) 404. See, also, Sherman v. Black, 49 Vt. 198; Oldham v. Broom, 28 Ohio St. 41.

[3] Craythorne v. Swinburne, 14 Vesey, 160; per Lord Eldon, C. To the effect that a surety of a surety is liable to contribution, see Cooke v. ——, Freeman's Ch. R. 97.

for the discharge of an attachment, became fixed by a judgment against his principal and united with him in an undertaking for a supersedeas, and an additional surety was required in the latter undertaking, which the principal with the assent of A procured, and B became such surety, it was held that no right of contribution arose in favor of A against B in case A had to pay the debt.[1]

§ 231. **Surety who becomes principal liable for whole amount paid by former co-surety—Other cases.**—When one of several sureties afterwards assumes the character of a principal, he becomes liable to the other sureties as principal for the whole amount paid by them. Thus, R, having contracted to erect a building, assigned his contract to C, who then executed to him a bond with M, G and others as sureties, conditioned to pay R for stone already quarried for the building. Afterwards, with the knowledge and consent of the sureties, C assigned the building contract to M, with a condition that M should perform all the undertakings, and assume all risks and liabilities imposed upon C as assignee of the contract. M accepted the assignment, performed the work and received the benefits of the building contract, but failed to pay for the stone. G having been compelled to pay the sum due for the stone, it was held that he was entitled to recover from M, as principal, the full amount paid by him.[2] A being desirous of borrowing $50 at a bank, applied to B and C to be his sureties, when it was agreed between A and B in the presence of C, that $100 should be borrowed, and that B should have half the sum. A note for $100 was signed by the three and discounted at the bank. B received one-half the money, and gave A his note for it. C having paid the note, it was held that he had a right to recover from B, as principal, the whole sum so paid.[3] A promissory note, by its terms payable at a bank, was signed by principal and surety, with the expectation that it would be discounted at the bank. The bank refused to discount the note, unless the creditor signed the note on its face as a maker. He did this under an express understanding with the bank, that

[1] Hartwell v. Smith, 15 Ohio St. 200. To similar effect, see Knox v. Vallandingham, 13 Smedes & Mar. (Miss.) 526.

[2] Gray v. McDonald, 19 Wis. 213; on this subject, see, also, Ragland v. Milam, 10 Ala. 618.

[3] Jones v. Fitz, 5 New Hamp. 444; to similar effect, see McPherson v. Talbott, 10 Gill & Johns. (Md.) 499.

he was not thereby to become a co-surety with the other parties, but the surety of all of them. He had to pay the note, and it was held that he could recover the whole amount from the surety.[1] A became surety for B and C, partners in trade, upon their note payable to D for $2,000, and B conveyed to A certain of his property for indemnity. Shortly afterwards B bought out all C's interest in the business, and agreed to pay all the partnership debts. B became insolvent and did not pay the note, and judgment on the same was obtained against C, who paid it, and A conveyed to C $2,000 worth of the property conveyed by B to him, for his indemnity. Held, that this last conveyance might lawfully be made, and could not be impeached by a judgment creditor of B.[2] The owner of imported goods consigned them to a commission merchant for sale, who entered them at the custom house, giving his bond for the import duties, upon which bond the owner and another became sureties, and the consignee immediately charged the owner with the amount of the duties, and afterwards failed before the bond became due. The owner paid the money due on the bond, and it was held he could recover contribution from the other surety in the bond. The court said that on account of the nature of the transaction, the debt was that of the consignee, and the owner and the other surety were co-sureties.[3] Three parties contracted for the purchase of land, which was to be conveyed to them in three equal shares. They gave for the purchase money three joint notes for equal amounts, signed by them all. Held, each one was principal for one-third of each note, and co-surety of the others for two-thirds of each, and their rights and liabilities must be determined on that basis.[4]

§ 232. **Surety who pays debt for which principal or another surety is not liable, cannot have contribution.**—As a general rule, one surety cannot recover contribution from another, when the debt paid by the surety seeking contribution was either not binding on the principal, or not binding on the other surety. Thus a surety, who, knowing all the facts, pays a note which is void for usury, cannot recover contribution from a co-surety on the note. A surety ordinarily has no greater rights against a co-surety than the creditor has against them both, and in such case, the creditor has no lawful claim against any of them.[5] But if

[1] Bowser *v.* Rendell, 31 Ind. 128.

[2] Butler *v.* Birkey, 13 Ohio St. 514.

[3] Taylor *v.* Savage, 12 Mass. 98.

[4] Goodall *v.* Wentworth, 20 Me. 322.

[5] Russell *v.* Failor, 1 Ohio St. 327.

the surety paying a note tainted with usury, had at the time of such payment no knowledge of the usury, he may recover contribution from a co-surety.[1] Where one surety on an official bond was sued at law, and a judgment recovered against him for a demand for which he was not liable as surety, it was held he could not call on his co-surety for contribution. The court said that the surety who pays "takes the place of the original creditor, and may be resisted on the same principles, and in the same way."[2] Two co-sureties were sued jointly, and judgment was rendered in favor of them both. The creditor appealed to the Supreme Court from the judgment in favor of one of them, and such judgment was as to such surety reversed, and judgment in the Supreme Court was rendered against such surety for a large amount, which he paid. Held, he could not recover contribution from the other surety. The judgment which as to him remained in force in the court below, established the fact that he was not liable to the creditor, and consequently not liable for contribution.[3] It has been held that a surety who pays a debt, after he might have defeated it by pleading the statute of limitations, can recover contribution from a co-surety on the ground that the surety who paid was under no obligation, legal nor equitable, to defeat a just claim by such a plea.[4] A surety paid the debt of a deceased principal, after the claim against his estate had been barred by the statute of non-claim, and it was held he was entitled to contribution from a co-surety. The debt, although barred as against the estate of the principal, was not barred as against the surety who paid it, and he was liable for it when he made the payment.[5]

§ 233. **When one surety entitled to benefit of indemnity secured by another surety.**—If one of several sureties after all have signed, and before the debt has been paid, and without any agreement to that effect before he became liable, obtains from the principal anything for his indemnity, such indemnity inures to the benefit of all the sureties, and the surety obtaining it immediately becomes the trustee of it for the benefit of all the sureties, even though he obtained it by his own exertions, and it was intended

[1] Warner *v.* Morrison, 3 Allen, 566.

[2] Lowndes *v.* Pinckney, 1 Richardson's Eq. (So. Car.) 155, per Dunkin, C.

[3] Ledoux *v.* Durrive, 10 La. An. 7.

[4] Jones *v.* Blanton, 6 Ired. Eq. (Nor. Car.) 115.

[5] Evans *v.* Evans, 16 Ala. 465.

for his sole benefit.[1] In such case, as all the sureties are alike liable for a common principal, it will be presumed that the surety taking the indemity, takes it for the benefit of all the sureties, or if he does not, then his taking from the effects of the common principal for his sole benefit is a fraud on the other sureties, and he will not be permitted to have the benefit of the indemnity alone, but must share it with the others. Where, after two sureties became bound, one received indemnity from the principal, with which he paid more than one-half the debt, and the other surety paid the remainder, it was held the latter might recover from the former one-half the amount which he had paid.[2] It has also been held that the surety who has partial indemnity in his hands, and pays all the debt, can only recover from his co-surety one-half the sum which would remain after applying the amount of the indemnity on the sum paid.[3] A and B were co-sureties on a note for C, and B was indebted to C on a note of about the same amount. It was afterwards agreed between B and C that C should deliver to B his note, and that B should pay that amount of the note on which he and A were sureties, and B's note was delivered to him by C. Afterwards B and C made a different agreement with reference to the amount of B's note. B had to pay the note on which he and A were sureties, and sued A for contribution. Held, that when B received his own note from C, as above, he received it for the benefit of A as well as himself, and could not divert it from the purpose for which he received it, and he could only recover from A a *pro rata* share after deducting the amount of the note.[4] Where a surety after he becomes bound and before he is damnified, takes a mortgage on property of the principal to indemnify himself, if

[1] Seibert *v.* Thompson, 8 Kansas, 65; Steele *v.* Mealing, 24 Ala 285; Miller *v.* Sawyer, 30 Vt. 412; McLewis *v.* Furgerson 5 The Reporter, 330; McCune *v.* Belt, 45 Mo. 174; Hartwell *v.* Whitman, 36 Ala. 712; Smith *v.* Conrad, 15 La. An. 579; Hinsdill *v.* Murray, 6 Vt. 136; Leary *v.* Cheshire, 3 Jones, Eq. (Nor. Car.) 170; Low *v.* Smart, 5 New Hamp. 353; Gregory *v.* Murrell, 2 Ired. Eq. (Nor. Car.) 233; Hall *v.* Robinson, 8 Ired. Law. (Nor. Car.) 56; Fagan *v.* Jacocks, 4 Dev. Law (Nor. Car.) 263. To a contrary effect, see Thompson *v.* Adams, 1 Freeman's Ch. R. (Miss.) 225; Cooper *v.* Martin, 1 Dana (Ky.) 23; Hall *v.* Cushman, 16 New Hamp. 462.

[2] Agnew *v.* Bell, 4 Watts, (Pa.) 31.

[3] Currier *v.* Fellows, 27 New Hamp. 366.

[4] Hall *v.* Robinson, 8 Ired. Law (Nor. Car.) 56. Holding that an indemnity placed in the hands of one surety for the benefit of all, cannot be diverted from that purpose; Hinsdill *v.* Murray, 6 Vt. 136; Hayes *v.* Davis, 18 New Hamp. 600.

there are several demands on which he is surety with different co-sureties, and the security is taken generally for his indemnity, it has been held that the indemnity shall be apportioned among all the demands *pro rata*.[1] Where a surety took from the principal a mortgage to secure a debt due from the principal to such surety and also to indemnify such surety against loss as such, and there was no provision in the mortgage as to which debt should be paid first, it was held that the proceeds of the mortgage should be applied *pro rata* to the payment of the debt due from the principal to the surety, and to the payment of the debts for which the surety was liable as such with a co-surety.[2] But in a similar case it was held, that the surety who took the indemnity might first pay from the proceeds the debt due him individually.[3] One of two sureties paid the debt and took an assignment of a mortgage given by the principal to secure the debt. He then foreclosed the mortgage (after first requesting his co-surety to pay one-half the debt and take an assignment of the mortgage jointly with him), and bid in the property for a nominal sum. In a suit by him against his co-surety for contribution, it was held that he was a trustee of the mortgaged premises for his co-surety, and bound to account for their value at the time they were sold, and not at a subsequent time, and was entitled to commissions for his trouble.[4]

§ 234. **Instances of indemnity taken by one surety inuring to the benefit of all the sureties.**—To prevent circuity of action and attain the ends of natural justice, equity will completely indemnify one of the sureties in a bond, by means of a lien on the property of the principal, existing in favor of another surety for the indemnity of such other surety, and for that purpose the court will compel the creditor (all the parties being before it,) to resort to that property in the first place for the satisfaction of the debt.[5] Two sureties having become bound, the principal placed an indemnity in the hands of one of them, and he assumed to pay the debt, and after having paid it in part, procured a third person to purchase the debt for his benefit. The assignee sued the debt in his own name, and recovered a judgment against both sureties,

[1] Brown *v.* Ray, 18 New Hamp. 102.

[2] Moore *v.* Moberly, 7 B. Mon. (Ky.) 299.

[3] Brown *v.* Ray, 18 New Hamp. 102.

[4] Livingston *v.* Van Rensselaer, 6 Wend. 63.

[5] West *v.* Belches, 5 Munford (Va.) 187.

and had an execution issued and levied on the property of the surety who had no indemnity. Held, equity would interfere and compel the payment of the debt by the indemnified surety, and restrain its collection from the other surety.[1] A principal gave a surety who was liable with a co-surety, a mortgage for his indemnity, the mortgage stating the debts it was given to secure. The mortgagee afterwards had to pay as surety for his principal, a certain sum for which he became liable after the making of the mortgage. Held, the mortgagee must account to his co-surety for the mortgaged property, and could not retain anything from the proceeds thereof to indemnify himself from loss on account of the debt for which he subsequently became surety.[2] In order to indemnify his several sureties, a principal assigned to a trustee a claim to be collected for their benefit. Before this claim was collected, the sureties were each compelled to pay an equal portion of the debt. One of the sureties, A, obtained judgment against the principal for the sum paid by him, on which the principal was arrested, and gave a prison bounds bond, with sureties, which he forfeited, and the sureties thereon became liable. The assignee afterwards collected the claim for the benefit of the sureties. Held, that neither A nor the sureties in the prison bounds bond could come on the fund in the hands of the trustee till all the other sureties had been fully indemnified. A, having obtained another security, had two funds to look to, while the other sureties only had one; and he must first exhaust the one in which they were not interested. The sureties in the prison bounds bond were not in as good a position as A, because the effect of their act was to defeat the recovery of indemnity from the principal.[3] Complainants and defendants were bound as sureties for one S, to whom the defendant was indebted, and judgment was recovered against all the sureties, which they paid in equal proportions. S, as indemnity to the defendant for the sum paid by him, caused the notes which he held against the defendant to be surrendered to him. Held, the complainants were entitled to contribution from the defendant, and that the amount of the notes so surrendered to the defendant should be accounted for by him to his co-sureties.[4] Two co-sureties were offered security by their

[1] Silvey v. Dowell, 53 Ill. 260.

[2] Steele v. Mealing, 24 Ala. 285.

[3] Givens v. Nelson, 10 Leigh (Va.) 382.

[4] Tyus v. DeJarnette, 26 Ala. 280.

jured thereby. Negligence under such circumstances is equivalent to a positive act producing the same result.[1] Thus, where a surety held a chattel mortgage for his indemnity, on slaves of the principal, and after the mortgage might have been foreclosed, he suffered some of the slaves to be sold by the sheriff for another debt of the principal, and lost as a security, it was held that he must account to his co-surety, who had paid the debt for the slaves so lost by his negligence.[2] So where property was conveyed by the principal for the indemnity of one of two sureties, and it was sold for that purpose, but through the negligence of the surety for whose indemnity it was conveyed, the purchase money was not collected and was lost, it was held he could not recover contribution from his co-surety.[3] The surety who receives from his principal a chattel mortgage of slaves and other property, must account to his co-surety for such of the property as is wasted in consequence of his laches and for the value of the hire of the slaves.[4] A surety is not however accountable to his co-surety for a loss arising by reason of his failure to record a chattel mortgage given by the principal for his indemnity, when he agreed with the principal at the time he took the mortgage, that he would not record it. In such case he is bound by the agreement, and the co-surety has no greater rights than he has.[5]

§ 237. **Surety who obtains indemnity after all the sureties have paid an equal amount, is not obliged to share it with the others.**—After the debt of the principal is paid by several sureties, in equal proportions, the equities between them as co-sureties cease, and each becomes an independent creditor of the principal for the amount paid by him. In such case, if one afterwards receives indemnity from the principal, the others are entitled to no part thereof.[6] So, where one of two sureties paid the entire debt, and the principal afterwards paid him for his sole benefit, one-half the amount, it was held that he was afterwards entitled to recover from his co-surety the other half of the debt he had paid for the principal.[7] One of two sureties, with the consent of the other, gave up a security which he had taken for

[1] Schmidt v. Coulter, 6 Minn. 492.
[2] Steele v. Mealing, 24 Ala. 285.
[3] Chilton v. Chapman, 13 Mo. 470.
[4] Goodloe v. Clay, 6 B Mon. (Ky.) 236.
[5] White v. Carlton, 52 Ind. 371. To similar effect, see Pool v. Williams, 8 Ired. Law (Nor. Car.) 286.
[6] Messer v. Swan, 4 New Hamp. 481; Harrison v. Phillips, 46 Mo. 520.
[7] Gould v. Fuller, 18 Me. 364.

the benefit of both, on receiving a written promise of the principal that he would pay the debt or return the security. This promise was not performed, and the sureties paid the debt of $1,080, by giving their joint and several notes therefor, payable on time. Before the note was paid or payable, the surety to whom the promise was made, sued the principal for breach thereof, and in consequence received from him $600. Held, he was liable for one-half of this amount to his co-surety.[1] In this case, although the money was received after the debt was paid, the promise was made before that time. A was collector of state revenue, and gave a bond, with B and C as sureties. He collected certain money of the state, which he deposited in his own name in a private bank instead of in the state bank, where it should have been deposited. A became a defaulter for a much larger sum and B and C each paid one-half of the defalcation. B then sued A for indemnity, and garnished the private bank, and by legal proceedings got the money there deposited. Held, C was entitled to one-half the money thus obtained by B, on the ground that the money belonged to the state, and not to A, and each surety, when he paid, was entitled to subrogation to the claim of the state against A, and consequently each was entitled to one-half the money.[2]

§ 238. **When suit for contribution can be brought by surety holding indemnity.**—Although there is a conflict of authority on the subject, the weight of authority seems to be that the fact that the surety who pays the debt, has in his hands an indemnity other than money, and more or less valuable, will not prevent him from suing a co-surety for contribution, and recovering such amount as he is then entitled to, irrespective of the sum that may afterwards be realized from the indemnity; but he will be accountable to the co-surety for a proper proportion of whatever sum he may afterwards realize from the indemnity.[3] A surety who had some indemnity in his hands, paid the debt and sued his co-surety for contribution. Held, the amount he had received from the indemnity should be deducted from the amount he had paid, and a judgment for one-half the remainder should be rendered against the co-surety. If the party holding the indemnity

[1] Doolittle v. Dwight, 2 Met. (Mass.) 561.

[2] Harrison v. Phillips, 46 Mo. 520.

[3] Johnson's admrs. v. Vaughn, 65 Ill. 425.

afterwards realizes anything from it, he must account to his co-surety for one-half of it, but the fact that he had the indemnity would not prevent him from recovering.[1] A principal gave his sureties a mortgage on slaves for their indemnity, and judgment was afterwards recovered against the principal and sureties, which one of the sureties paid. The sureties filed a bill to foreclose the mortgage which was pending. The surety who paid the debt brought suit against the principal to recover the amount paid by him, and the suit was pending. The surety who paid the debt, then sued a co-surety for contribution, and it was held that, notwithstanding the pendency of the other two suits, he was entitled to recover.[2] Where a surety held for his indemnity certain bonds of third persons, and judgment had been recovered against him, the principal, and a co-surety of which he had obtained an equitable assignment, it was held that equity would not permit him to enforce the collection of one-half the judgment from the co-surety, unless he showed that he could not have collected the bonds by reasonable diligence.[3] It has been held that a surety who is fully indemnified, cannot recover contribution from his co-surety.[4] It has also been held that the surety who has partial indemnity in his hands, in the shape of property of the principal, can only recover from a co-surety one-half the amount paid by him after deducting therefrom the value of the property.[5]

§ 239. **Surety may before paying debt, file bill to compel co-surety to contribute and to restrain him from transferring his property.**—The remedy between co-sureties is usually sought after the debt has been paid by some of them, but a surety may before he has paid the debt, file a bill against his co-surety to compel him to contribute to its payment.[6] So where judgment was recovered against a principal and two sureties, and the principal was insolvent, and one of the sureties having some real estate in his wife's name was about to sell it to an innocent purchaser, it was held that the other surety before paying the debt might by suit in chancery, restrain him from selling the property till the

[1] Bachelder v. Fiske, 17 Mass. 464.

[2] Anthony v. Percifull, 8 Ark. (3 Eng.) 494.

[3] Kerns v. Chambers, 3 Ired. Eq. (Nor. Car.) 576.

[4] Morrison v. Taylor, 21 Ala. 779.

[5] Currier v. Fellows, 27 New Hamp. 366.

[6] McKenna v. George, 2 Richardson, Eq. (So. Car.) 15.

debt for which they were liable as sureties was paid. The court said: "While at law, the surety has no remedy until he has paid the debt, equity with a view of placing the performance of the duty where it primarily belongs, will interpose at the instance of the surety as soon as the debt becomes due to compel its payment by the principal. * A court of equity, to prevent a multiplicity of suits, in order to do right and distribute justice, will, in the first instance, impose the discharge of the duty or performance of the obligation upon the party primarily and ultimately bound. Instead, therefore, of requiring the surety to pay, and then reimbursing him by decree against the principal, it permits the surety at once to resort to the court to compel the principal to discharge his obligation. Although the question is new and without precedent in the books, so far as we have been able to see, this equity is quite as strong in favor of a surety (where the principal is insolvent) against his co-surety. It is well supported by authority, and thoroughly approved, by the reason that, if the principal has made or is about to make secret or fraudulent dispositions of his property, so as to throw the debt upon his surety, the latter may have ample remedy. If the principal is insolvent, and therefore the debt rests as a common and equal burden upon the sureties, do not the same considerations appeal with equal force to the chancellor, that he may see to it, that one of them shall not, by secret or fraudulent contrivances or conveyances of property, fasten the whole of it upon the other? We think that the principle may well have this extended application."[1] After a judgment creditor had filed a creditor's bill against the principal and others, to subject money or assets fraudulently assigned by the principal to such others, a surety for the debt paid it, upon the express condition that he should have the right to prosecute the creditor's bill. Held, that paying the judgment, did not, under the circumstances, extinguish it, and the surety had a right to prosecute the creditor's bill.[2]

§ 240. **Discharge of surety in bankruptcy does not release him from contribution to co-surety, who pays subsequently.**—The discharge of a surety in bankruptcy does not usually release him from a claim to contribution by a co-surety who afterwards pays the debt. In a case in which this was held, the court said: "There

[1] Bowen v. Hoskins, 45 Miss. 183, per Simrall, J.

[2] Harris v. Carlisle, 12 Ohio. 169.

was here no debt capable of estimation in order to its being proved, because two contingencies were to be taken into consideration; first, whether the original debtor would not himself pay the debt, and secondly, whether this defendant would ever be called upon to pay it. I do not see how it is possible to say that any such debt existed between these parties as could have been proved under the commisson."[1]

§ 241. **When surety who is discharged from liability to creditor liable to contribute to co-surety, who subsequently pays.**—It has been held that the release of one surety, without the consent of his co-surety, from liability to the creditor, will not discharge him from liability to contribute to the co-surety, who is subsequently compelled to pay the debt.[2] But where suit was brought against one of two sureties, and judgment recovered which such surety paid, and before the judgment was rendered, the other surety who was not sued, became released by the statute of limitations, it was held that the latter was thereby released from liability to contribution. In this case the surety who was sued had a statutory right to have compelled a suit to be brought against the other surety.[3]

§ 242. **Rights of bail, who pay the debt, against the principal and sureties for the debt.**—If one of two sureties in a bail bond in a civil action, voluntarily pays the judgment against the principal before the bail are fixed, he cannot recover contribution from his co-surety in the bond: The latter had a right to relieve himself from liability by surrendering the body of the principal, and he could not be deprived of this right by a voluntary payment by the other surety.[4] An attachment of B's property was dissolved upon a bond being given by him, with C and D as sureties. The creditor A, recovered a judgment in the attachment suit against B, which was not paid, and then brought suit on the bond and recovered a judgment therein against B, C and D, and arrested B on the execution issued on this judgment. B applied to take the oath for the relief of poor debtors, and en-

[1] Clements *v.* Langley, 2 Nevile & Man. 269, per Denman, C. J.; Goss *v.* Gibson, 8 Humph. (Tenn.) 197; Eberhardt *v.* Wood, 2 Tenn. Ch. R. (Cooper,) 488; Dunn *v.* Sparks, 1 Ind. 397; Swain *v.* Barber, 29 Vt. 292; Keer *v.* Clark, 11 Humph. (Tenn.) 77. To contrary effect, see Tobias *v.* Rogers, 13 New York, 59; Miller *v.* Gillespie, 59 Mo. 220. See, also, on this subject, Hays *v.* Ford, 55 Ind. 52.

[2] Hill *v.* Morse, 61 Me. 541; Clapp *v.* Rice, 15 Gray, 557.

[3] Shelton *v.* Farmer, 9 Bush. (Ky.) 314.

[4] Skillin *v.* Merrill, 16 Mass. 40.

tered into the statutory recognizance with E as surety, to deliver himself up for examination. * After a breach of the condition of the recognizance, C and D paid the amount of the judgment to which they were parties to A, and brought suit in his name for their benefit, on the recognizance against E. Held, they could not recover. Payment of the judgment by them discharged it and released E. There was no privity between C and D and E. They were sureties for A under different contracts. They were all principles as to E; nor did the doctrine of subrogation apply.[1] Principal and surety executed a bond, but the fact of suretyship did not appear from it. Suit was commenced on the bond, and the principal was arrested and gave bail, who at that time had no knowledge of the suretyship. The surety was not served, and no judgment was rendered against him. The bail was obliged to pay the debt, and sued the surety for indemnity. Held, he was not entitled to recover.[2] A and B owed a note upon which suit was commenced, and A was arrested, and C became his bail. Judgment was recovered against A and B, which C, as the bail of A, was obliged to pay. Held, that C was not entitled to recover indemnity from B, as there was no privity between them. It was the case of a person paying the debt of another without any request express or implied.[3]

§ 243. **When surety who pays judgment may have execution thereon against co-surety.**—Judgment was recovered against A, B, C and D, who were co-sureties. A, B and C paid the judgment, and had execution issued thereon, and placed in the sheriff's hands, with directions to make one-fourth of it from the property of D. No property of D was found, and A, B and C filed a creditor's bill against him to reach his effects. Held, the sureties who paid were entitled to subrogation to the creditor's rights in the judgment, so as to proceed against their co-surety D, and that a court of equity would prevent the extinction of a judgment, so as to afford a surety a remedy against a co-surety.[4] Although this is the approved doctrine, it has been held that the surety who pays a judgment, thereby extinguishes it, and that he cannot afterwards have an execution thereon against his co-surety.[5]

[1] Holmes v. Day, 108 Mass. 563.

[2] Smith v. Bing. 3 Ohio, 33.

[3] Osborn v. Cunningham, 4 Dev. & Bat. Law (Nor. Car.) 423.

[4] Cuyler v. Ensworth, 6 Paige Ch. R. 32.

[5] McDaniel v. Lee, 37 Mo. 204; Hull v. Sherwood, 59 Mo. 172.

§ 244. **How liability to contribution affected by giving of time to one of several co-sureties.**—If one of two co-sureties consents to the giving of time to the principal, and the other does not, and the one who so consents afterwards has the debt to pay, he cannot recover contribution from the surety, who did not consent to the extension. The latter was discharged from his obligation to the creditor, and likewise from contribution, by the extension. There is no stronger obligation between co-sureties that they shall contribute, than there is that they shall pay the creditor, and a giving of time releases them from the creditor, and will under the foregoing circumstances release them from each other.[1] A was creditor, B principal, and C, D and E sureties, on a bond, which became due, and C gave his obligation to A, payable by instalments, in payment of the debt. Subsequently, and after the payment of the first instalment, C took from B his bond for an extended time, to secure the same debt. Held, that by the payment of the original debt as above, C became subrogated to the place of A, the creditor, and that by giving time to B, the same results followed as if C had been the original creditor. C could not, therefore, recover contribution from D.[2] After judgment against a principal and two sureties, the creditor gave time to one of the sureties. Held, he thereby discharged the other surety from liability to him for the portion of the debt which the surety to whom the time was given was liable to contribute.[3] Two sureties entered into an indemnity bond, and one of them being pressed for payment, gave a warrant of attorney to confess judgment for the debt, due at a future time, and afterwards paid the debt. Held, that the giving of time to him by the creditor, did not discharge his co-surety from liability to contribute.[4]

§ 245. **Contribution as affected by release of principal or of co-surety—Failure of consideration—Set off, etc.**—If a surety releases the principal from liability to indemnify him, he thereby releases his co-surety from contribution.[5] If there are three sureties, and one of them pays the debt and releases one of the others upon payment of less than his share, he may recover from

[1] Brown v. McDonald, 8 Yerg. (Tenn.) 158; Beckham v. Pride, 6 Richardson Eq. (So. Car.) 78; Boughton v. Bank of Orleans, 2 Barb. Ch. R. 458.

[2] Cameron v. Boulton, 9 Up. Can. C. P. R. 537.

[3] Ide v. Churchill, 14 Ohio St. 372.

[4] Dunn v. Slee, 1 Moore, 2.

[5] Draughan v. Bunting, 9 Ired. Law (Nor. Car.) 10; Fletcher v. Jackson, 23 Vt. 581.

the third surety one-third of the debt which he has paid.[1] The right to contribution between co-sureties is not destroyed by the fact that they agree among themselves to pay and do pay the debt due a bank, in the notes of the bank.[2] Where a surety is released by the creditor, with the consent of his co-sureties, he thereupon ceases to be co-surety with them, and is not afterwards liable to them for contribution.[3] If one of several co-sureties agrees to pay the entire note on which they are liable, but the consideration for the agreement fails, and he afterwards pays the note, he will not be prevented by the agreement from recovering contribution from his co-sureties. The action for contribution being an equitable one, equitable principles should prevail.[4] It has been held that in an action by a surety against his co-surety for contribution, the latter cannot defend by setting up by way of counter-claim recoupment or set-off a cause of action existing in favor of the principal against the plaintiff.[5] A being principal, and B, C and D sureties, they all became insolvent except D, who paid the debt. Before such payment, but after C and D became sureties, D executed his bond to C for a sum less than half the amount of the debt for which they were liable as A's sureties, and C assigned this bond to a trustee for the benefit of his creditors. Held, the trustee stood in no better position than C and D might by bill in equity set off C's liability to him as co-surety against his liability on the bond.[6] A and B were the payees and accommodation indorsers of a note made for the accommodation of C, and signed by him Having been obliged to pay the note, A sued C for indemnity, after his remedy against C on the note was barred by the statute of limitations, but within apt time after he paid the money. Held, he was not entitled to recover. The court said that his only remedy against C was on the note, and that was barred by the statute. Until the time of Lord Mansfield, the surety had no remedy at law against his principal on an implied promise. His remedy for reimbursement was in equity, unless he took a bond to secure indemnity. Implied promises will not be raised where there is no necessity for it.

[1] Currier v. Baker, 51 New Hamp. 613.

[2] Derossett v. Bradley, 63 Nor. Car. 17.

[3] Moore v. Isley, 2 Dev. & Batt. Eq. (Nor. Car.) 372

[4] Prindle v. Page, 21 Vt. 94.

[5] O'Blenis v. Karing, 57 New York, 649.

[6] Wayland v. Tucker, 4 Gratt. (Va.) 267.

"If the party choose to take a security, there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties."[1]

§ 246. **How far judgment against one surety evidence against co-surety in suit for contribution—Failure of consideration.**—Where a judgment was recovered against a principal and one surety, which was paid by the latter, it was held in a suit by such surety against a co-surety, for contribution, that the co-surety could not show as a defense that the consideration of the note on which they were both sureties, had failed. The court said: "No question of consideration is involved in the contest between co-sureties, for they enter into the undertaking without reference, as between themselves, to the consideration paid their principal. If his contract was entirely without consideration, the relative rights of these parties would be precisely the same, and on payment by one, the right to contribution is called into existence. Each has impliedly agreed with the other to protect him to the extent of the joint undertaking against the consequences arising out of the failure of the principal."[2] It has been held that a joint judgment against co-sureties is, in a suit between them for contribution, conclusive evidence that a cause of action existed against them.[3] Where judgment is recovered against part of the sureties, in a bond which is satisfied by them, it has been held, in a suit by them against their co-sureties, for contribution, that such judgment is competent evidence to show the amount of the payment made by the plaintiffs, and the circumstances under which it was made, but not for the purpose of proving the liability.[4]

§ 247. **When surety can recover contribution for costs paid by him.**—Whether a surety can recover from his co-surety contribution for the costs of a suit against him, for the collection of the debt, depends upon the circumstances of each case. Where a joint judgment is recovered against the principal and two sureties, or against two sureties alone, and one of them pays it, he can recover one-half of the costs of the suit from his co-surety. In holding this principle, it has been said: "The failure to pay

[1] Kennedy v. Carpenter, 2 Wharton (Pa.) 344. Holding that one surety on a sheriff's bond cannot recover at law on the bond against his co-sureties, see Mitchell v. Turner, 37 Ala. 660.

[2] Cave v. Burns, 6 Ala. 780, per Goldthwaite, J.

[3] Waller v. Campbell, 25 Ala. 544.

[4] Fletcher v. Jackson, 23 Vt. 581.

which occasioned the costs, was imputable to the defendant as much as to the plaintiff. The plaintiff paid the execution, including the costs. * The costs cannot be distinguished from the debt. Every equitable principle which entitles the plaintiff to contribution for the one, applies equally to the other."[1] So, a surety may recover contribution from his co-surety for the costs and expenses of defending a suit against him for the debt, if the defense was made under such circumstances as to be regarded prudent.[2] Where the only surviving surety on a joint bond (he alone being subject to an action at law) is sued, and defends the action *bona fide*, and thereby reduces the amount of the creditor's demand, the representatives of a deceased co-surety are liable to contribute towards payment of the costs, and other expenses incurred in defending the action at law.[3] Where two co-sureties executed a warrant of attorney on which judgment was entered up, it was held that the surety who paid the judgment and costs, could recover one-half the costs from his co-surety.[4] It has, however, been held that a surety cannot recover from his co-surety any part of the costs of defending himself in a suit against him by the creditor, unless the co-surety authorized him to defend the action.[5]

§ 248. **Estate of deceased co-surety liable for contribution.**— If two co-sureties become bound in a joint, or joint and several obligation, and one of them dies, and the other before or after such death, pays the debt, he can recover contribution from the estate of such deceased co-surety, either at law or in equity, to the same extent as if such co-surety was alive. As between co-sureties there is an implied agreement for contribution at the time they sign, and this implied agreement is not joint, but several. It is like any other promise to pay money for which the personal representative of the deceased promisor is liable; and it makes no difference whether the default was committed before or after the death of the promisor.[6]

[1] Davis *v.* Emerson, 17 Me. 64, per Weston, C. J.; see, also, Briggs *v.* Boyd, 37 Vt. 534.

[2] Fletcher *v.* Jackson, 23 Vt. 581; see also, Breckenridge *v.* Taylor, 5 Dana (Ky.) 110.

[3] McKenna *v.* George, 2 Richardson Eq. (So. Car.) 15.

[4] Kemp *v.* Finden, 12 Mees. & Wels. 421.

[5] John *v.* Jones, 16 Ala. 454; Knight *v.* Hughes, Moody & Mal. 247.

[6] Bradley *v.* Burwell, 3 Denio, 61; Aikin *v.* Peay, 5 Strob. Law (So. Car.) 15; Conover *v.* Hill, 76 Ill. 342; Bachelder *v.* Fiske, 17 Mass. 464; Stothoff *v.*

§ 249. **Surety who pays by his note may recover contribution from co-surety.**—If two co-sureties are bound for a debt, and one of them pays it by giving his own note for it, which is accepted by the creditor as payment, the surety thus paying may at once and before paying the note so given as payment, sue his co surety for contribution, the same as if he had paid the debt in money. In holding this, it has been said: "Where one person is obligated to pay money for the use of another, a payment made in any mode, either property or negotiable paper, or securities, if such payment is received as full satisfaction of the demand, it is equivalent to, and will be treated as, a payment in cash. * Where the payment is received as a complete satisfaction, and the debt or obligation is extinguished, it is a matter of no moment to the person to whose use the payment is made, whether it is made in money, property or obligations. The benefit to him is the same, and the obligation to refund should be the same." [1]

§ 250. **What contribution surety who pays in land entitled to recover.**—Where a surety paid the debt of the principal in lands, it was held, in a suit for contribution by him against a co-surety, that the price at which the lands were taken as payment by the creditor, would ordinarily be the amount on which the damages should be founded, but if the lands were taken at a very high price, as a compromise of a doubtful claim, the actual value of the lands might, perhaps, be the basis of the damages, and in such case the actual value of the lands should be allowed, no matter what they cost the surety.[2] Where a principal was insolvent, and one of two co-sureties paid the debt in real estate, which was taken by the creditor at about twice its value, on account of the failing condition of the parties, it was held that the surety thus paying was entitled to recover from his co-surety, as contribution, one-half of what the real estate was worth, and no more.[3]

Dunham's Exrs. 4 Harrison (N. J.) 181; McKenna v. George, 2 Richardson's Eq. (So. Car.) 15; *contra*, Waters v. Riley, 2 Harris & Gill. (Md.) 305. As to when the estate of a deceased surety which has been distributed to his heirs, is liable to contribute to a co-surety who has paid the debt, see Williams v. Ewing, 31 Ark. 229.

[1] Ralston v. Wood, 15 Ill. 159, per Caton, J.; Pinkston v. Taliaferro, 9 Ala. 547; Anthony v. Percifull, 8 Ark. (3 Eng.) 494; Hutchins v. McCauley, 2 Dev. & Bat. Eq. (Nor. Car.) 399; White v. Carlton, 52 Ind. 371; Robertson v. Maxcey, 6 Dana (Ky.) 101. *Contra*, Brisendine v. Martin, 1 Ired. Law (Nor Car.) 286; Nowland v. Martin, 1 Iredell Law (Nor. Car.) 307.

[2] Jones v. Bradford, 25 Ind. 305.

[3] Hickman v. McCurdy, 7 J. J. Mar. (Ky.) 555.

§ 251. **When surety who has paid less than his share of the debt cannot recover contribution.**—A surety who has paid a portion of the debt, leaving the remainder unpaid, cannot usually recover contribution from his co-surety, unless the amount so paid by him is more than his share of the common debt. The co-surety may, in such case, pay the remainder to the creditor. In holding this, it has been said that: "The right to contribution is founded, not on contract, but on the principle that equality of burden, as to a common right, is equity. * Where joint promisors or co-sureties have received equal benefits, or been relieved from common burthens, neither shall recover over against another, unless for the excess paid by him beyond his due proportion or equal share."[1] If, however, a surety discharges the entire debt by payment of less than his share, he may recover contribution from his co-surety.[2] Where one of two co-sureties of an insolvent administrator, purchased, at a discount, legacies for which the sureties were bound, it was held he could only charge his co-surety for one-half of what he paid for the legacies, and one-half the expense of purchasing them.[3]

§ 252. **In what proportions co-sureties are liable to contribute.**—If one of several co-sureties who are equally bound for the debt, pays it, he has a right in equity to recover, as contribution from his solvent co-sureties, a pro rata amount of the sum paid by him, based upon the number of solvent co-sureties, and excluding the insolvent ones.[4] The fact that one of several co-sureties has left the state, has in this regard been considered equivalent to his insolvency.[5] As a general rule, the surety who has paid the debt can at law only recover from his solvent co-sureties an aliquot part of the debt, based on the whole number of co-sureties, solvent and insolvent.[6] But in a state where there were no courts of equity, it was held that the surety who paid the

[1] Fletcher *v.* Grover, 11 New Hamp. 368; per Woods, J. Davies *v.* Humphreys, 6 Mees & Wels. 153; Lytles' Exrs. *v.* Pope's admr. 11 B. Mon. (Ky.) 297.

[2] Stallworth *v.* Preslar, 34 Ala. 505.

[3] Tarr *v.* Ravenscroft, 12 Gratt. (Va.) 642.

[4] Powell *v.* Matthis, 4 Ired. Law, (Nor. Car.) 83; Young *v.* Lyons, 8 Gill (Md.) 162; Samuel *v.* Zachery, 4 Ired. Law (Nor. Car.) 377; Klein *v.* Mather, 2 Gilman (Ill.) 317; Burroughs *v.* Lott, 19 Cal. 125; Young *v.* Clark, 2 Ala. 264; Breckinridge *v.* Taylor, 5 Dana (Ky.) 110.

[5] McKenna *v.* George, 2 Richardson Eq. (So. Car.) 15.

[6] Stothoff *v.* Dunham's Exrs. 4 Harrison (N. J.) 181; Morrison *v.* Poyntz, 7 Dana (Ky.) 307; Cowell *v.* Edwards, 2 Bos. & Pul. 268.

debt might at law recover contribution based on the number of solvent co-sureties, and excluding the insolvent ones.[1] On a question of contribution, partners who sign in the partnership name are to be regarded as but one surety.[2] Whatever the number of the principals may be, it cuts no figure with reference to the amount of contribution which will be enforced between co-sureties.[3] If three co-sureties agree among themselves when they sign, that if the principal fails to pay they will each pay one third, the surety who pays the whole debt can only recover from a solvent co-surety one-third of the amount so paid, even though the other co-surety is insolvent.[4] Where three persons give a note for their joint debt, each is to be considered with respect to the other as a surety with regard to two-thirds, and as a principal with regard to one-third of the debt; and if one be insolvent and another pays the whole debt, the third shall contribute one-half to the one who pays.[5] Where co-sureties are bound for the same thing, but in different amounts, they are liable to contribute in the proportion of the amounts of the obligations signed by them respectively. Thus, A became bound for a deputy sheriff, in a bond of $2,000. B became liable for the same deputy on a similar bond for $18,000. A was obliged to pay the $2,000. Held, he was entitled to recover from B eight-ninths of the amount so paid by him.[6] In another case, A was a guardian, and B became his surety in a bond of $10,000. C subsequently became A's surety in a bond of $5,000; both sureties being liable for the same thing, but in these amounts. Held, that B might recover from C one third of the amount which he had paid for the default of the common principal.[7] But where several stockholders of a corporation, each owning different amounts of stock, signed a note as surety for the corporation, and one of them paid such note, it was held, he was entitled to recover contribution from his co-sureties, based on their number, and not on the amount of stock held by them respectively.[8]

[1] Henderson v. Duffee, 5 New Hamp. 38.

[2] Chaffee v. Jones, 19 Pick. 260.

[3] Kemp v. Frinden, 12 Mees. & Wels. 421.

[4] Swain v. Wall, 1 Reports in Chancery, 149

[5] Henderosn v. Duffee, 5 N.Hamp. 38.

[6] Armitage v. Pulver, 37 New York, 494.

[7] Bell v. Jasper, 2 Iredell's Eq. (Nor. Car.) 597. To same effect, see Jones v. Blanton, 6 Iredell's Eq. (Nor. Car.) 115.

[8] Coburn v. Wheelock, 34 NewYork, 440.

§ 253. **Surety may recover contribution either at law or in equity.**—One of several co-sureties who has paid the debt, may recover contribution from the others in a suit at law, for money paid for their use, or he may bring his suit for contribution in chancery. Originally the only remedy was in chancery, but courts of law afterwards assumed jurisdiction. The fact, however, that courts of law have assumed jurisdiction in this matter, or that it has been conferred upon them by statute, does not oust equity of its original jurisdiction. With reference to this it has been said: "The right to sue in chancery for contribution, was an established head of chancery jurisdiction in the time of Queen Elizabeth on the plain principles of natural justice. * Ultimately courts of law entertained actions between sureties, but the court of chancery did not on that account renounce its jurisdiction. This tribunal still exercises a concurrent jurisdiction in all cases for contribution between sureties."[1]

§ 254. **Whether surety must show insolvency of the principal in order to recover contribution.**—In an action at law by a surety against his co-surety for contribution, the weight of authority seems to be, that the insolvency of the principal need not be averred nor proved.[2] It has, however, been repeatedly held, that in a suit in equity by one surety against another for contribution, no recovery can be had unless the principal is shown to be insolvent, on the ground that the right to contribution does not rest on contract but on natural justice, and this element is wanting when the principal is solvent.[3] As the right to contribution is grounded upon the same reasons, both at law and in equity, it seems that the rule should be the same in both jurisdictions.

§ 255. **When suit for contribution should be joint and when**

[1] Couch *v.* Terry, 12 Ala. 225, per Collier, C. J.; Kemp *v.* Finden, 12 Mees. & Wels. 421; Bachelder *v.* Fiske, 17 Mass. 464; Sloo *v.* Pool, 15 Ill. 47; Foster *v.* Johnson, 5 Vt. 60; Crowder *v.* Denny, 3 Head (Tenn.) 359; *contra*, Carrington *v.* Carson, Conference Reports (Nor. Car.) 216.

[2] Judah *v.* Mieure, 5 Blackf. (Ind.) 171; Caldwell *v.* Roberts, 1 Dana (Ky.) 355; Buckner's Admr. *v.* Stewart, 34 Ala. 529; Rankin *v.* Collins, 50 Ind. 158; Roberts *v.* Adams, 6 Port. (Ala.) 361; *contra*, Morrison *v.* Poyntz, 7 Dana (Ky.) 307.

[3] Daniel *v.* Ballard, 2 Dana (Ky.) 296; Rainey *v.* Yarborough, 2 Ired. Eq. (Nor. Car.) 249; Bolling *v.* Donegby, 1 Duvall (Ky.) 220; Allen *v.* Wood, 3 Ired. Eq. (Nor. Car.) 386; Lawson *v.* Wright, 1 Cox, 275; McCormack's Admr. v. Obannon's Exr. 3 Munf. (Va.) 484.

several.—Where two or more co-sureties jointly pay the debt, they may join in a suit either at law or in equity against a co-surety for contribution,[1] but when each pays separately they cannot usually join in such a suit.[2] If one of several co-sureties pays the debt, he cannot usually maintain a joint action for contribution against his co-sureties.[3] A surety who has paid the debt cannot sue his principal and a co-surety jointly for reimbursement.[4] If two co-sureties pay the debt by their joint note, they may join in a suit for contribution against another co-surety, even though the latter became surety for them on the note with which they paid the debt.[5] Where three of four co-sureties paid part of the debt in money, each paying an equal amount, and for the remainder gave their note, which was accepted as payment, it was held that each might maintain a separate suit for contribution against the fourth surety.[6] Four parties were liable as co-sureties, and two of them each gave one-third the amount of the debt to a third surety, who put the remaining third necessary to pay the debt with the money thus given him, and therewith paid the debt. Held, the three sureties thus paying might join in a suit against the fourth for contribution. This was put upon the ground that each of the three sureties had paid the one-fourth which he ought to pay, and then each had contributed an equal sum to pay the amount for which the other surety was liable, and had paid it in one payment. The Court said: "We are of opinion that when three persons, each of whom is responsible for an entire sum, due from another, join in making the payment of that sum by a contribution agreed on among themselves for that purpose, they may join in one action to recover it from the person for whose benefit the payment has been made."[7] Ten parties became sureties in a bond, and the principal and four of the sureties became insolvent. Five of the solvent sureties paid the debt, each paying an equal amount, and brought a joint bill in equity for contribution against the remaining solvent surety. Held, the bill could be maintained, although it was admitted that

[1] Dussol v. Bruguiere, 50 Cal. 456; Fletcher v. Jackson, 23 Vt. 581.

[2] Lombard v. Cobb, 14 Me. 222; Prescott v. Newell, 39 Vt. 82.

[3] Powell v. Matthis, 4 Ired. Law (Nor. Car.) 83.

[4] Burnham v. Choat, 5 Up. Can. K. B. R. (O. S.) 736.

[5] Prescott v. Newell, 39 Vt. 82.

[6] Atkinson v. Stewart, 2 B. Mon. (Ky.) 348.

[7] Clapp v. Rice, 15 Gray (Mass.) 557, per Hoar, J.

if the action had been at law several suits would have been necessary.[1] A, B and C being co-sureties, judgment was recovered against them, and execution was levied on separate property belonging to each. A and B paid the judgment and filed a joint bill against C and others, to be subrogated to the lien of the levy on the land of C, and to set aside certain conveyances thereof by C, which were alleged to be fraudulent. Held, the bill might be maintained. The Court said that the object sought by the suit was the benefit of the levy. The levy is an entire thing in the sense of giving a lien capable of being enforced by sale for complainant's benefit; and their rights and interests, however separate in regard to their payments to the creditor and in regard to their claim against the pocket of their co-surety come together and join in the pursuit and subjection of the lien.[2]

§ 256. **Who not necessary parties to a bill for contribution, etc.**—To a suit in equity by a surety who has paid the debt against a co-surety for contribution, neither an insolvent principal nor insolvent co-sureties are necessary parties.[3] It has also been held that a solvent co-surety who lives out of the state is not a necessary party to a suit in equity for contribution between the other sureties.[4] Where one of two partners is insolvent, and has absconded, and the other is dead, leaving a solvent estate, a surety for the firm who has paid the debt, may proceed in equity against the estate of the deceased partner, without prosecuting a suit against the survivor.[5]

§ 257. **Surety may without compulsion pay debt when due and immediately sue co-surety for contribution without demand or notice.**—As soon as the debt becomes due, any one of several co-sureties may, without suit or compulsion on him of any kind, at once pay the debt and recover contribution from his co-sureties. All the co-sureties are equally liable for the whole debt, and a payment of the debt by one of them after it is due and without compulsion is in no sense a voluntary payment.[6] And in such case the surety who pays the debt may immediately and without

[1] Young *v.* Lyons, 8 Gill (Md.) 162.

[2] Smith *v.* Rumsey, 33 Mich. 183, per Graves, J.

[3] Byers *v.* McClanahan, 6 Gill & Johns. (Md.) 250; Johnson's Admrs. *v.* Vaughn, 65 Ill. 425; Young *v.* Lyons, 8 Gill (Md.) 162.

[4] Jones *v.* Blanton, 6 Ired. Eq. (Nor. Car.) 115.

[5] Horsey *v.* Heath, 5 Ohio, 353.

[6] Judah *v.* Mieure, 5 Blackf. (Ind.) 171; Bradley *v.* Burwell, 3 Denio, 61; Stallworth *v.* Preslar, 34 Ala. 505; Pitt *v.* Purssord, 8 Mees. & Wels. 538; Lucas

any demand on his co-surety, or notice to him, sue him for contribution. In holding this, it has been said that upon payment by the surety, "the law immediately raised an obligation from the defendant to the plaintiff to pay an aliquot part of this sum, according to the number of the sureties. It was a present debt. It was a payment for the use of the defendant upon his request, implied by law; no special demand and notice were therefore necessary."[1]

§ 258. **When liability to contribution attaches.**—The liability of one surety to another for contribution, and of the principal to a surety for indemnity, attaches or springs up at the time the obligation which they have signed is delivered, and whenever payment may be made by the surety, he is considered as a creditor of his principal or co-surety from the time the obligation was made and delivered. This principle is applicable to a case where, after the obligation is delivered, and before it is paid, the principal or co-surety makes a conveyance of his property, which the surety who pays seeks to set aside as fraudulent.[2]

§ 259. **When claim for contribution barred by the statute of limitations.**—The statute of limitations begins to run between co-sureties at the time the debt is paid, irrespective of the time when the obligation was entered into or became due.[3] The surety who has paid more than his share of the debt, may for every separate payment he makes, sue his co-security for contribution, and the statute of limitations runs against each payment from the time it is made.[4] Where suit is commenced against one of two co-sureties before the debt is barred by the statute of limitations, and judgment is recovered against him, and the debt paid by him after the time when the statute would have been a bar if no suit had been previously brought, and after the debt is barred

v. Guy, 2 Bailey Law (So. Car.) 403; Linn *v.* McClelland, 4 Devereux & Batt. Law. (Nor. Car.) 458.

[1] Chaffee *v.* Jones, 19 Pick. 260, per Shaw, C. J.; Cage *v.* Foster, 5 Yerg. (Tenn.) 261; Wood *v.* Perry, 9 Iowa, 479; Parham *v.* Green, 64 (Nor. Car.) 436; *contra*, Carpenter *v.* Kelly, 9 Ohio, 106.

[2] Sargent *v.* Salmond, 27 Me. 539; Wayland *v.* Tucker, 4 Gratt. (Va.) 267.

[3] Wood *v.* Leland, 1 Met. (Mass.) 387; Singleton *v.* Townsend, 45 Mo. 379; Broughton *v.* Robinson, 11 Ala. 922; Knotts *v.* Butler, 10 Richardson, Eq. (So. Car.) 143; Camp *v.* Bostwick, 20 Ohio St. 337; Preslar *v.* Stallworth, 37 Ala. 402; Sherrod *v.* Woodard, 4 Devereux Law (Nor. Car.) 360; Stallworth *v.* Preslar, 34 Ala. 505; May *v.* Vann, 15 Fla. 553.

[4] Davies *v.* Humphreys, 6 Mees. & Wels. 153.

by the statute against the co-surety, the statute begins to run between the sureties from the time of payment, and the surety who pays may recover contribution from his co-surety at any time after such payment and within the statutory limitation.[1]

[1] Crosby *v.* Wyatt, 10 New Hamp. 318; Crosby *v.* Wyatt, 23 Me. 156. For case holding surety discharged from contribution by long delay under peculiar circumstances, see Williamson's Admr. *v.* Rees's Admr. 15 Ohio, 572.

CHAPTER XII.

OF SUBROGATION.

§ 260. **Surety who pays the debt entitled to subrogation—How far his right in this regard extends.**—Intimately connected with the relation of principal and surety is the doctrine of subrogation. This is a doctrine of the court of chancery, and cannot usually be enforced in a court of law.[1] In cases where the person paying a debt stands in the situation of a surety or guarantor, equity substitutes him in the place of the creditor as a matter of course, without any special agreement to that effect. A mere stranger or volunteer who pays a debt, cannot thus be subrogated to the creditor's rights.[2] It has been said "That the surety, upon performance by him of his contract, is entitled to the original evidences of debt held by the creditor, and to any judgment in which the debt has been merged, as well as to all collateral securities held by the creditor. The right of the surety is not only that of subrogation, pure and simple, but a right to an assignment by the creditor. *. By performing the contract of suretyship, the principal obligation is discharged against the creditor and is kept alive between the creditor, the debtor and the surety, for the purpose of enforcing the rights of the last."[3] It has also been said that subrogation is a mode which equity adopts to compel the ultimate discharge of a debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay.[4] Where a party became bound by bond, which the importer and owner of certain goods did not sign, for duties due the United States, and afterwards paid such duties, it was held he was entitled to be subrogated to all the rights and preferences of the United States, for the pay-

[1] Smith *v.* Harrison, 33 Ala. 706.

[2] Griffin *v.* Orman, 9 Florida, 22; Winder *v.* Diffenderffer, 2 Bland's Ch. (Md.) 166; Richmond *v.* Marston, 15 Ind. 134; Coe *v.* New Jersey Midland R. R. Co. 27 New Jer. Eq. 110; Hough *v.* Ætna Life Ins. Co. 57 Ill. 318; Wilson *v.* Brown, 2 Beasley (N. J.) 277; Shinn *v.* Budd, 1 McCarter (N.J.) 234.

[3] Fielding *v.* Waterhouse, 8 Jones & Spencer (N.Y.) 424, per Sedgwick, J. To same effect, see Berthold, Admx. *v.* Berthold, 46 Mo. 557.

[4] McCormick's Admr. *v.* Irwin, 35 Pa. St. 111, per Strong, J. See, also, Heart *v.* Bryan, 2 Devereux Eq. (Nor. Car.) 147.

ment of the duties. The court said that the importer remained liable for the duties, notwithstanding the giving of the bond, and the signer of the bond, although bound by a separate instrument, still occupied the position of a surety, and was entitled to subrogation as such.[1] A surety who becomes such at the request of the creditor, and without any request from the principal, is, if he pay the debt, entitled to subrogation. "The right of the surety to demand of the creditor whose debt he has paid, the securities he holds against the principal debtor, and to stand in his shoes, does not depend at all upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded not upon any contract, express or implied, but springs from the most obvious principles of natural justice."[2]

§ 261. **Surety not entitled to subrogation till he pays the debt—May waive right to subrogation—Discharged if right rendered unavailing by creditor.**—Generally a surety or guarantor does not become entitled to subrogation until he has actually paid the debt for which he is liable.[3] But it makes no difference how he makes such payment. Thus sureties who pay the creditor in the creditor's own obligations,[4] and a surety who borrows money on his own notes, with which he pays the debt, but who has not paid such notes,[5] are entitled to subrogation. As the surety, when subrogated, stands in the shoes of the creditor, he is not entitled to any greater rights than the creditor was immediately before payment.[6] The right to subrogation may be waived by the surety. Thus, where one surety consented that another surety might receive an indemnity from the principal for his sole benefit, it was held that the surety so consenting could not afterwards be subrogated to and share in such indemnity, but was bound by his waiver, even though no consideration passed between the sureties.[7] A judgment was recovered against a principal, which became a lien on his land. Afterwards a judg-

[1] Enders *v.* Brune, 4 Randolph (Va.) 438.

[2] Mathews *v.* Aikin, 1 New York, 595, per Johnson, J. See, also, on this subject, McArthur *v.* Martin, 23 Minn. 74; Eaton *v.* Hasty, 6 Nebraska, 419; Talbot *v.* Wilkins, 31 Ark. 411.

[3] Gilliam *v.* Esselman, 5 Sneed, (Tenn.) 86.

[4] City of Keokuk *v.* Love, 31 Iowa, 119.

[5] Stedman *v.* Freeman, 15 Ind. 86.

[6] Dozier *v.* Lewis, 27 Miss. 679.

[7] Tyus *v.* De Jarnette, 26 Ala. 280.

ment for the same debt was recovered against B, a surety, which he paid. Afterwards C recovered a judgment against B, and still later D recovered a judgment against B. After the recovery of all the judgments, the creditor assigned the judgment against the principal to B, who was entitled to subrogation thereto, and B on the same day assigned the judgment to D. Held, he might lawfully do so, and that D thereby obtained precedence in said assigned judgment over C. The court said that B's "right of substitution is a personal one, which he might waive, and what right has his creditor to insist that it shall be exercised, not for his benefit, but against his will."[1] A surety upon payment of the debt is entitled to subrogation to all the securities held by the creditor for the payment of such debt at the time the same is paid, even though such securities were acquired without the knowledge of the surety, and after he became bound.[2] "It is a well settled principle that the surety who has paid the debt of his principal, is entitled to stand in the place of the creditor as to all securities for the debt held or acquired by the creditor, and to have the same benefit from them as the creditor might have had. * If the creditor parts with, or renders unavailable securities, or any fund which he would be entitled to apply in discharge of his debt, the surety becomes exonerated to the extent of the value of such securities, because securities which the creditor is entitled to apply in discharge of his debt, he is bound to apply, or to hold them as a trustee, ready to be applied for the benefit of the surety."[3]

§ 262. **Person who occupies situation of surety or guarantor entitled to subrogation.**—Any one who stands in the position of a surety or guarantor, whether strictly and technically such or not, is entitled to subrogation the same as a surety or guarantor. Thus, the grantor of land who has been obliged to pay a mortgage which had been assumed by the grantee as part of the purchase money, is entitled to subrogation.[4] One of two joint purchasers of real estate who has paid more than his share of the purchase money, occupies the position of a surety as to such ex-

[1] Harrisburg Bank v. German, 3 Pa. St. 300; but see Neff v. Miller, 8 Pa. St. 347.

[2] Scanland v. Settle, Meigs (Tenn.) 169; Scott v. Featherston, 5 La. An. 306; Smith v. McLeod, 3 Ired. Eq. (Nor. Car.) 390.

[3] Cullum v. Emanuel, 1 Ala. 23, per Collier, C. J.

[4] Marsh v. Pike, 10 Paige Ch. R 595.

cess, and is entitled to subrogation, and his right in that regard will prevail over the right of dower of the widow of the other joint purchaser.[1] So, where one of several principals agreed to pay a debt upon funds for that purpose being placed in his hands by the other principals, such other principals occupy the position of sureties, and if compelled to pay the debt, they are entitled to subrogation.[2] The same thing was held where one partner was obliged to pay the firm debts after selling out to the other partners, who agreed to pay the same.[3] Although at law one who accepts a bill for the accommodation of the drawer is regarded in favor of a *bona fide* holder as the principal debtor, yet, as between such acceptor and the drawer, the acceptor stands in the relation of a surety, and in equity is entitled, on payment of the bill, to be subrogated to the position of such holder of the bill in respect to any securities of the drawer held by such holder to secure the payment thereof.[4] Where a creditor has two funds to which he may resort for the satisfaction of his debt, the one of which is primarily and the other only secondarily liable for the payment thereof, and the creditor makes the money out of the fund secondarily liable, the owner of such fund stands in the situation of a surety for the owner of the primary fund, and is entitled to subrogation.[5]

§ 263. **Surety may enforce subrogation by suit in chancery.**—At an early day, a surety who paid a bond signed by himself and a principal, was held to be entitled by suit in chancery to compel the assignment of the bond to himself.[6] Judgment was recovered against a principal and surety, and execution was issued against the surety, who filed a bill to compel the creditor to assign the judgment to him upon payment of the debt. The creditor did not wish to do this, as he wanted the judgment extinguished, so as to let in some subsequent securities he had taken from the principal. The court of chancery ordered the judgment

[1] Wheatley's Heirs *v.* Calhoun, 12 Leigh (Va.) 264.

[2] Buchanan *v.* Clark, 10 Gratt. (Va.) 164.

[3] Frow, Jacobs & Co.'s Estate, 73 Pa. St. 459.

[4] Bank of Toronto *v.* Hunter, 4 Bosworth (N. Y.) 646.

[5] Eddy *v.* Traver, 6 Paige, Ch. R. 521.

[6] Morgan *v.* Seymour, 1 Reports in Chancery, 120 (decided A. D. 1640.) To a contrary effect, where the surety offered to pay the debt, and demanded an assignment, see Gammon *v.* Stone, 1 Vesey, Sr. 339; the Chancellor there saying that the assignment was useless.

to be assigned.[1] So, it has been held that a surety who pays the amount of the debt into court, is entitled to a decree for subrogation. The court said: "A surety who satisfies the debt for which he is liable, is entitled to have from the creditor whose debt he pays, the securities which such creditor has obtained from the debtor; and if such securities are not voluntarily given up, it is the right of the surety to come to this court to have such security delivered."[2] Sureties who have paid the debt of their principal have a right to file a bill in chancery to set aside an illegal sale of property mortgaged by their principal for the payment of the debt, and to have the proceeds properly applied.[3] After the creditor has been paid, he cannot interfere to prevent a decree of subrogation in favor of one of several defendants in a judgment who has paid the debt. "His claim is satisfied, and he has no right to interfere with any disposition which the court thinks proper to make of the judgment as between the defendants."[4] Certain sureties of a railroad company were by decree of court subrogated to the rights of the creditor against the company, and the decree provided that unless the money was paid within ten days, the road should not be operated. The money was not paid and the road was operated by a trustee, the company being insolvent, and the trustee was attached for contempt. The court said the right of subrogation was purely equitable, and the extent to which it would be exercised depended upon circumstances. Whether it will be extended to the extremest point depends upon whether it is necessary to the protection of the sureties. Stopping the operating of the road would only depreciate it in value, and in no way benefit the sureties, and the attachment was discharged.[5]

§ 264. **How far surety will be subrogated to rights of creditor in suits commenced by him for recovery of the debt.**—If a debt is paid by a surety, and the creditor assigns to him any collateral securety therefor, the debt will be regarded as still subsisting and undischarged, so far as is necessary to support the security. It has been held that an attachment is a collateral securety for the payment of the debt, and if the debt with the action or execution

[1] Hill *v.* Kelly, Ridgeway, Lapp & Schoales (Irish) 265.

[2] Goddard *v.* Whyte, 2 Giffard, 449, per Sir John Stuart, V. C.

[3] Lowndes *v.* Chisholm, 2 McCord Eq. (So. Car.) 455.

[4] Springer's Admr. *v.* Springer, 43 Pa. St. 518, per Lowrie, C. J.

[5] *In re* Hewitt, 10 C. E. Green (N. J.) 210.

is assigned to a surety, to enable him to avail himself of the property attached, the debt will be considered unpaid for that purpose only. "The rule that a surety may take an assignment of any security for the payment of the debt, which is held by the creditor, unavoidably implies an exception to the general rule that the payment of a debt by a co-debtor discharges the other co-debtors, whether the debt rests in contract merely or is merged in a judgment. It is of the nature of all securities for a debt, to be the mere incidents of that debt and entirely dependent upon it. Payment of a debt discharges all the securities for it. The mortgage either of real or personal property is discharged by payment of the mortgage debt; and in the same way pledges are at once at an end when the debt is paid. If, then, it was held that by the payment of a debt by the surety the debt was entirely discharged, then all the collateral securities of the creditor must be also discharged. He would no longer have anything to assign, and the equitable principle that the surety is entitled to the benefit of all the securities of the creditor, would be entirely defeated. But it has never been so held, but the debt is regarded as still unpaid and unsatisfied so far, and perhaps no further, than is necessary to the preservation of the surety's interest in such secureties."[1] A verbal assignment of an attachment has been held sufficient in such a case.[2] A surety by recognizance, who pays the whole amount into court when pressed with crown process, is entitled to use the crown secureties in order to levy a moiety from his co-surety, and the fact that he has received indemnity from the principal, does not interfere with such right, but he must share his indemnity with the co-surety.[3] Principal and sureties executed a note, and the principal died. The creditor stated, swore to, and filed his account against the estate of the principal, in the probate court. One of the sureties paid the debt, and it was held that he was entitled to stand in the place of the creditor as to the steps previously taken to enforce the claim against the estate of the principal, and was subrogated to his right to prosecute the same to an allowance, and to demand payment of the administrator, in the class in which it was placed by the original

[1] Edgerly v. Emerson, 23 New Hamp. 555, per Bell, J. A decision to a contrary effect concerning a replevin bond taken in a suit, was rendered in Moore v. Campbell, 36 Vt. 361.

[2] Brewer v. Franklin Mills, 42 New Hamp. 292.

[3] Latouche v. Pallas, Hayes (Irish) 450.

filing. The court said: "For the purpose of obtaining indemnity from the principal, he is considered as at once subrogated to all the rights, remedies and securities of the creditór, and entitled to all his liens, priorities, and means of payment against the principal."[1] But where pending a suit on a note against the principal and indorser, jointly, the indorser paid the note, it was held that this payment was a bar to the further prosecution of the suit, even at the instance and for the benefit of the indorser.[2]

§ 265. **Subrogation will not be allowed when it is inequitable, or will prejudice rights of creditor—Instances.**—Subrogation cannot be enforced when its enforcement would be contrary to equity, for the whole doctrine is the creature of equity; nor can it be enforced to the prejudice of the creditor with reference to the debt for which the surety is liable.[3] Thus, a principal bought land and took a bond for its conveyance, and also gave bond with surety for part of the purchase money. The principal sold the conveyance bond to another, and the surety knew of the sale at the time thereof, but made no objection, and afterwards took a mortgage on other property from the principal for indemnity, and suffered the principal to leave the state with other property. Held, that the surety upon being compelled to pay the debt, would not be subrogated to the vendor's equitable lien, and thus get precedence of the purchaser of the conveyance bond. Having tacitly assented to its sale and taken other security, he was equitably estopped to claim subrogation.[4] A and B gave a joint and several note to C for $450, and to secure the same executed to him a mortgage on six pieces of land, three of which belonged to A and three to B. The note and mortgage were signed by B, as the surety of A, but this did not appear from the instruments. Afterwards A mortgaged one of the same pieces of land to D, to secure $100, and D afterwards became the legal holder of the first note and mortgage by assignment from C. The mortgage for $100 was foreclosed by D, who then brought a suit against A and B to foreclose the mortgage given by them. B filed a cross-bill, and claimed that upon payment of the $450 note he was entitled to hold all three pieces of the land mort-

[1] Braught v. Griffith, 16 Iowa, 26, per Dillon J.

[2] Griffin v. Hampton, 21 Ga. 198.

[3] Stamford Bank v. Benedict, 15 Ct. 437.

[4] Henley v. Stemmons, 4 B. Mon. (Ky.) 131.

gaged by A, as his indemnity, and that the subsequent mortgage to secure $100, should be subject to the prior mortgage, to which he claimed to be subrogated. D did not appear to have had notice that B was a surety. It was held that B was not entitled to subrogation, on the ground that D had no notice of his rights as surety, and would, without fault on his part, be prejudiced if subrogation was allowed.[1] A party sold a tract of land and took three notes of the vendee for the purchase money, taking no other security than retaining his vendor's lien. Apprehending that the land, if sold, would not pay the notes, the vendor instituted on the second note an attachment suit against the purchaser, and levied on certain horses, to secure the release of which the purchaser gave a bond with sureties. Judgment was rendered for the plaintiff in the attachment suit. Afterwards the vendor obtained judgment on the third note, and sold the land and applied the proceeds to the payment of the the third note. The sureties in the bond given in the attachment suit, filed a bill claiming to be subrogated to the lien of the judgment obtained in the attachment suit, and to have the proceeds of the sale of the land applied to the payment of that judgment, claiming that it was a lien on the land prior to the lien of the judgment obtained on the third note. Held, they were not entitled to the relief, because to grant it would not be to place them in the position of the creditor with reference to the liens, but to take from the creditor a security which he had obtained, and cause him to lose the debt.[2] A executed a mortgage to secure several notes due from him to B, and B assigned all the notes, except the first one, to C. Afterwards A sold the mortgaged premises to D, who agreed to pay all the notes, but did not, and the mortgage was foreclosed. A paid B the note held by him, with the understanding that such payment should not extinguish the note, and had it transferred to a third party. The mortgaged premises did not bring enough to pay all the notes, and the proceeds were ordered to be paid on the notes in the order of their maturity. A claimed that by means of the principles applicable to subrogation, the note he had paid to B

[1] Orvis *v.* Newell, 17 Ct. 97.

[2] Crump, *v.* McMurtry, 8 Mo. 408. Holding that a surety will not be subrogatedso as to defeat an interest acquired and held by a third person, when that interest, though subordinate to that of the creditor, is prior in date to the undertaking of the surety, see Farmers & Drovers' Bank *v.* Sherley, 12 Bush (Ky.) 304.

should be first paid from such proceeds. Held, the claim was not well founded. Although by the transaction A occupied the position of a surety for D, yet he was a principal as to C, and the proceeds of the mortgage must be first applied to paying the notes held by C.[1] A county treasurer gave bond with sureties in the sum of 7,000*l.*, and became a defaulter to the extent of 18,000*l.* The sureties filed a bill, claiming that upon payment of the 7,000*l.* they were entitled to sue on the bond, and stand in the place of the creditor for that sum. The court said that if the crown had been fully paid the subrogation would have been decreed, for the crown would then have been a mere trustee, but as a large balance remained due the crown the subrogation would not be made. "If the debts due to the crown and a subject be equal in degree, the prerogative of the crown gives priority to the former."[2] Under certain peculiar circumstances, where it would be inequitable to refuse it, subrogation will be allowed, although it prejudice the claim of the creditor against the principal. Thus a bond with surety in the penal sum of 10,000*l.* was conditioned for the payment of all such sums as should be advanced to the principal. 20,000*l.* were advanced to the principal, who then became bankrupt. The surety paid the 10,000*l.*, and filed a petition to be subrogated to the rights of the creditor against the estate of the principal, where the claim for 20,000*l.* had been proved. Held, he was entitled to be subrogated for the 10,000*l.* paid by him, and to have precedence out of the bankrupt's effects over the other 10,000*l.* due the creditors. The sureties had a right (although the bond was conditioned for the payment of all advances) to suppose that the advances would not exceed 10,000*l.*, the penalty of the bond. The Chancellor said: "I think the bankers (creditors) are not entitled in equity to say as against the surety, that their demand is more than 10,000*l.*, the amount of the bond he has given, upon which he would be *prima facie* entitled to stand in their place; as to the residue of their debt, they ought to be so considered, if I may so express it, as their own insurers."[3]

§ 266. **Surety not entitled to subrogation until the whole debt is paid.**—As a general rule, subrogation cannot be enforced until the whole debt is paid to the creditor. Part may be paid

[1] Massie *v.* Mann, 17 Iowa, 131.
[2] The Queen *v.* O'Callaghan, 1 Irish, Eq. R. 439.
[3] *Ex parte*, Rushforth, 10 Vesey, 409, per Ld. Eldon, C.

by the principal and part by the creditor, and the surety then be entitled to subrogation, but the entire debt must be extinguished before subrogation can take place. It would not subserve the ends of justice to consider the assignment of an entire debt to a surety as effected by operation of law, where he had paid but a part of it and still owed a balance to the creditor, and a court of chancery would not countenance such an anomaly as a *pro tanto* assignment, the effects of which could only be to give distinct interests in the same debt to both creditor and surety. Until the creditor is fully satisfied, there cannot usually be any interference with his rights or his securities, which might even by bare possibility prejudice or embarrass him in any way in the collection of the residue of his claim.[1] A surety who has paid interest on a note secured by mortgage where the principal remains unpaid, is not entitled to subrogation as to such payments.[2] But a surety for a mortgagor who pays part of the mortgage, is, as against the mortgagor, entitled to a charge on the mortgaged estate in a suit brought by the mortgagee to foreclose a mortgage.[3] A creditor who holds, without special stipulations as to its application, security for various notes due from his debtor, some of which bear the name of sureties, may, in case of the insolvency of the principal and of some of the sureties, apply the same towards the payment of such of the notes as may be necessary for his own protection, and solvent sureties upon other of the notes cannot avail themselves thereof in any way, in equity, without paying, or offering to pay, the whole of the notes for which the security was given. Where a surety in such a case sought relief, the court said: "It is obvious, that in order to become entitled to such substitution, he must first pay the whole of the debt or debts for which the property is mortgaged or the collateral security is given, to the creditor, for it would be manifestly unjust and a plain violation of his rights, to compel him to relinquish any portion of the property before the obligation, for the performance of which it

[1] Hollingsworth *v.* Floyd, 2 Har. & Gill. (Md.) 87; Kyner *v.* Kyner, 6 Watts (Pa.) 221; Receivers of N. J. Midland R. R. Co. *v.* Wortendyke, 27 New Jer. Eq. 658; Bank of Pennsylvania *v.* Potius, 10 Watts (Pa.) 148; Swan *v.* Patterson, 7 Md. 164; *ex parte* Rushforth, 10 Vesey, 409; Magee *v.* Leggett, 48 Miss. 139. To contrary effect, see Williams *v.* Tipton, 5 (Humph.) Tenn. 66.

[2] Gannett *v.* Blodgett, 39 New Hamp. 150; Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. R. 334; Swan *v.* Patterson, 7 Md. 164.

[3] Gedye *v.* Matson, 25Beavan, 310.

was conveyed to him as security, had been fully kept and complied with."[1] Where a trust fund was provided for the payment of several notes of a principal, on one of which was a surety, and the surety paid such note, it was held he was entitled to be subrogated to the rights of the creditor, and to share *pro rata* in the proceeds of the trust fund, the decision being put upon the ground that such were the express terms of the trust.[2] Suit having been brought against principal and sureties on a city treasurer's bond, the sureties claimed a set-off, and also filed a cross-petition, claiming to be subrogated to certain rights of the city against a bank. Judgment was rendered against the sureties, but subrogation was denied them, and they then paid the judgment, and appealed from the order denying them subrogation. It was claimed that the sureties were not entitled to subrogation till they had paid the debt, and as they had not paid it when the decree was rendered, the decree was right. The court said: "All this is answered by the single proposition that the power of a court of equity is not limited to settling the rights of parties upon what has been done in the past, but it reaches forth and declares their duties and rights for the future, and in the exercise of this latter power it should have decreed that when the sureties paid the debt of their principal, they should be subrogated to the rights of the creditor."[3]

§ 267. **Surety not entitled to subrogation after statute of limitation has run, nor if he take separate indemnity.**—Where a surety who has paid the debt does no act before his claim is barred at law by the statute of limitations, manifesting his intention to put himself in the place of the original creditor, and thereby subrogating himself to the creditor's rights, equity will not subrogate him to those rights.[4] If the surety, knowing of the existence of a mortgage given by the principal for the payment of a debt, take a distinct securety for his indemnity from the principal, it has been held that he thereby waives his right of subrogation to the mortgage held by the principal. In such a case the court said: "He must proceed under one or other

[1] Wilcox *v.* Fairhaven Bank, 7 Allen, 270, per Merrick, J.

[2] Allison *v.* Sutherlin, 50 Mo. 274.

[3] City of Keokuk *v.* Love, 31 Iowa, 119, per Cole, J.

[4] Rittenhouse *v.* Levering, 6 Watts & Serg. (Pa.) 190; Joyce *v.* Joyce, 1 Bush (Ky.) 474; Fink *v.* Mahaffy, 8 Watts (Pa.) 384; Bank of Pennsylvania *v.* Potius, 10 Watts (Pa.) 148.

of the two rights which he claims. If he had bound himself to pay the mortgage and had done so, he would then have been entitled to the benefit of the mortgage. He has not done so. He has bargained by a separate instrument for an indemnity, which is perfectly distinct. * If a surety pay off the mortgage, he is entitled to the benefit of all the securities. But here the plaintiff has contracted with the mortgagor, for whom he is surety, that he should receive a particular species of indemnity if he pay off any part of the principal or interest of the mortgage. That indemnity he is entitled to and not to the benefit of the mortgage paid off."[1] It has however been held that a surety who has taken a particular indemnity from the principal, will upon payment of the debt be entitled to subrogation to securities which the creditor acquired after the taking of such indemnity.[2]

§ 268. **When surety who becomes such during prosecution of remedy against principal, not entitled to subrogation.**—A surety who was not originally bound for the debt, but who comes in during the prosecution of a remedy for the debt against the principal, cannot, by subrogation, obtain a preference over creditors of the principal whose liens attached before the surety became bound. Thus, three notes, payable annually, were executed and a lien retained on land to secure them. Judgment was obtained on the first note, which was replevied (stayed). The surety in the replevin bond paid it, and it was assigned to him. The holder of the third note brought suit to enforce the lien on the land, and it was held that his lien was superior to any right which the surety could obtain by means of subrogation.[3] The same thing was held where a judgment had been obtained against a principal who had given a mortgage on land to secure the debt, and he gave an injunction bond, with surety, to restrain the collection of the judgment. The court said: "We are decidedly of the opinion that a surety who first comes in as a surety in an obligation incidental to the prosecution of the legal remedy against the person

[1] Cooper *v.* Jenkins, 32 Beavan, 337, per Sir John Romilly, M R.; Cornwell's appeal, 7 Watts & Serg. (Pa.) 305.

[2] Lake *v.* Brutton, 8 De Gex, Macn. & Gor. 440.

[3] Bank of Hopkinsville *v.* Rudy, 2 Bush (Ky.) 326. To the same effect, where the surety became such for the purpose of staying an execution, see Armstrong's Appeal, 5 Watts & Serg. (Pa.) 352. For an application of the same principle to surety on notes for interest due on mortgage, see Swan *v.* Patterson, 7 Md. 164.

of the debtor, is *prima fâcie* to be considered as trusting to his principal only, for whom alone he is surety, that upon his paying the debt, he is entitled to stand in the creditor's place only as to his remedies against the person and property of the principal, and that as to any prior surety, or any prior interest in the property which may be under pledge, he must occupy the place of the debtor."[1] But where a judgment was recovered against principal and surety, upon which a *ca. sa.* was issued, and the surety arrested, and he turned out certain slaves to procure the discharge of his body from custody, and then gave a forthcoming bond for the slaves, with A as surety, which bond was forfeited, and A had the debt to pay, it was held that A was entitled to subrogation to the creditor's rights in the original judgment, and could enforce the lien of that judgment against land of the principal bound by the same.[2] Judgment was recovered against A and B, which became a lien on the land of A. Afterwards, B alone prosecuted a writ of error from the judgment, and gave C as surety on his error bond. The judgment was affirmed, and judgment was rendered against B and C in the Supreme Court, which C had to pay: Held, he was entitled to be subrogated to the lien of the judgment creditor against the land of A. The judgment below remained in force and unsatisfied, and A was bound for it when it was affirmed as much as B, and C having discharged it, was entitled to subrogation.[3]

§ 269. **Surety who pays entitled to subrogation to creditor's rights against co-surety.**—A surety who pays the debt for which he and a co-surety are liable, will be subrogated to the rights of the creditor against the co-surety to the same extent that he would be subrogated to the rights of the creditor against the principal. In holding this principle, a most eminent judge said: "Where a person has paid money for which others are responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged. This principle of sub-

[1] Patterson *v.* Pope, 5 Dana (Ky.) 241, per Marshall, J. But see Rodgers *v.* M'Cluers' Admr. 4 Gratt. (Va.) 81.

[2] Leake *v.* Ferguson, 2 Gratt. (Va.) 419.

[3] Taul *v.* Epperson, 38 Texas, 492.

stitution is completely established in the books, and being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor, as completely as if the instrument had been transferred to him, or to a trustee for his use. Under this supposition, he would be at full liberty to proceed against every person bound by the instrument. Equity would undoubtedly restrain him from obtaining more from any individual than the just proportion of that individual; but to that extent his claim upon his co-surety is precisely as valid as upon his principal."[1] Where two sureties signed a joint and several promissory note, under seal, in which there was a warrant to confess judgment, and one of them paid it, and the word "paid" was written across its face, it was held that the surety making such payment might have judgment entered on the note in the name of the payee to his use, and have execution thereon against his co-surety for his proportion. The court said: "An intent to prevent the extinguishment of the debt will be presumed, whenever it is the interest of the paying surety, it be kept alive. * A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety in the same manner as against the principal. An actual assignment is unnecessary. The right of substitution is the substantial thing, the actual substitution is unimportant. The right of substitution being shown, and the surety having paid the debt, he succeeds by operation of law to the rights of the creditor."[2] A joint judgment was rendered against C and H, who were the sureties of K. H replevied (stayed) the judgment, with M and others as sureties, and M had the debt to pay. Held, M was not the surety of C, who did not join in the replevin, but M having paid the debt of H, for which C was co-surety with H, if H was entitled to contribution from C, M would be subrogated to that right, and could, through that means, recover from C.[3] A surety obtained from his principal an assignment of a mortgage as an

[1] Per Marshall, C. J., in Lidderdale *v.* Robinson, 2 Brockenbrough, 159; holding the same view, see Hess' Estate, 69 Pa. St. 272; Howell *v.* Reams, 73 Nor. Car. 391; Croft *v.* Moore, 9 Watts (Pa.) 451; Burrows *v.* McWhann, 1 Desaussure Eq. (So. Car.) 409; *contra*, Bank *v.* Adger, 2 Hill Eq. (So. Car.) 262.

[2] Wright *v.* Grover & Baker S. M. Co., 82 Pa. St. 80, per Mercur, J.

[3] Crow *v.* Murphy, 12 B. Mon. (Ky.) 444.

indemnity, from which he received a certain sum. The lands of his co-surety were sold to pay the debt of the principal. Held, the creditors of such co-surety, whose liens were disappointed by such sale, had the right, with the consent of the co-surety, to be subrogated to the judgment held by the original creditor against the surety to the extent of one half of the amount thus received by him from the mortgage, and applied to the payment of the joint liabilities of the sureties.[1] Judgment was recovered against three co-sureties, and execution was levied on land belonging to each of them. Two of them paid the judgment and filed a bill to be subrogated to the lien of the levy against the land of the third. Held, they were entitled to the subrogation. The Court said the judgment was not extinguished by the payment. The English rule was different, but the American and better rule was that the payment did not extinguish the judgment unless such was the intention of those who paid. It was rather a purchase of the judgment, and would be so treated where equity required. "Where the intention with which the payment is made requires that the security should survive either generally or against particular persons, and the situation and relation of the parties will fairly admit it, a court of equity will generally, in this country, respect the intention and treat the security as in being to the end designed, and recognize and enforce the right of subrogation."[2]

§ 270. **Cases holding surety who pays amount of judgment entitled to subrogation thereto without assignment.**—The rule that a surety who pays the debt for which he is bound is entitled to subrogation to the rights of the creditor to some extent, is recognized by all the British and American courts, but there is great conflict among the cases as to the extent to which subrogation will be carried. One of the most fruitful sources of such conflict, is whether the payment by a surety of the amount of a judgment rendered against the principal for the debt, extinguishing the judgment, so as to cut off the surety from a right to subrogation thereto. If the surety makes such payment with the intention of extinguishing the judgment, the payment will have that effect. But if nothing appears as to the intent with which the payment is made, the better opinion seems to be that the

[1] Moore v. Bray, 10 Pa. St. 519.

[2] Smith v. Rumsey, 33 Mich. 183, per Graves, J.

judgment is discharged so far as any benefits which the creditor might otherwise personally derive therefrom is concerned, but is kept alive as between all parties thereto, for the purpose of enforcing the rights of the surety, and it will be presumed that it was the intention of the surety to keep the judgment alive, so that he may be subrogated to the creditor's rights thereunder.[1] In such case no assignment nor agreement for assignment of the judgment is necessary, as the rights of the surety result from the operation of law.[2] Nor does it make any difference that the surety, when he paid, did not know that there was any right of subrogation.[3] The levy of an execution having created an incumbrance on the estate of a person of unsound mind, his committee enjoined the collection of the judgment. The injunction was dissolved, and the sureties in the injunction bond had to pay the debt. Held, the committee did not lose its right of priority by enjoining the debt in good faith, and the sureties in the injunction bond had a right to be subrogated to the priority which the committee would have had if it had paid the execution.[4] Judgment was recovered against principal and surety, after which the principal gave absolute bail, and such bail was afterwards sued, and judgment was obtained against him for the debt. The surety paid part of the first judgment. Held, he was entitled to be subrogated to the judgment against the bail, who had "interposed to procure a personal advantage to the principal, and to the detriment of the surety, who might perhaps have been exonerated had the proceedings not been stayed against the principal."[5] Where separate judgments were recovered against principal and surety, and land of the principal was levied on, and the surety paid the judgment against himself, it was held that such payment operated in law and equity as an assignment of the judgment against the principal to the surety, and that the surety might proceed on such judgment for his own benefit.[6] So,

[1] Neilson *v.* Fry, 16 Ohio St. 552; Eddy *v.* Traver, 6 Paige Ch. R. 521; Hill *v.* Manser, 11 Gratt. (Va.) 522; Merryman *v.* The State, 5 Harris & Johns. (Md.) 423; Richter *v.* Cummings, 60 Pa. St. 441.

[2] Fleming *v.* Beaver, 2 Rawle (Pa.) 128.

[3] Dempsey *v.* Bush, 18 Ohio St. 376.

[4] Salter *v.* Salter's Creditors, 6 Bush (Ky.) 624.

[5] Burns *v.* Huntingdon Bank, 1 Pen. & Watts (Pa.) 395, per Gibson, C. J.

[6] Sotheren *v.* Reed, 4 Harris & Johns. (Md.) 307; to similar effect, and as to right of surety to file bill to subject equitable estate of principal, see Lyon *v.* Bolling, 9 Ala. 463; *contra*, Dow-

where separate judgments for the same debt were recovered against principal and surety, and the surety paid the judgment against himself, and thereupon the sheriff entered satisfaction on both executions, it was held that the surety would be allowed to vacate the entry of satisfaction on the execution against the principal, and to set up the judgment against him as a lien on his estate.[1]

§ 271. **Cases holding that surety who pays amount of judgment and takes assignment thereof can enforce judgment.**—If the surety, at the time he pays the amount of a judgment against the principal, take or stipulate for an assignment thereof, his intention not to extinguish the same is thereby manifest. And in such case, where the judgment was jointly against the principal and surety, it was held that the judgment was not extinguished, but that the surety should, as a judgment creditor, have the benefit thereof against the estate of the principal.[2] The same thing was held where separate judgments for the same debt were rendered against principal and surety, and the surety at the time of paying the judgment stipulated for, and afterwards obtained, an assignment to himself of the judgment against the principal.[3] Separate suits were brought against the maker and indorser of a note, and the indorser paid the amount due, upon an agreement between him and the holder that the suit against the maker should proceed for the benefit of the indorser. Held, the maker could not in the suit against him avail himself of the payment thus made by the indorser.[4] Where there was a judgment against principal and surety, and the creditor insisted on holding his judgment and enforcing a creditor's bill founded upon it, it was held that equity would compel him to receive payment of the debt from the surety and to assign the judgment to the surety.[5]

biggen *v.* Bourne, 2 Younge & Collyer (Exchequer) 462; where it was held, in such a case, that the judgment was extinguished by the payment, and a court of equity refused to compel an assignment thereof.

[1] Perkins *v.* Kershaw, 1 Hill Eq. (So. Car.) 344; *contra*, Sherwood *v.* Collier, 3 Dev. Law (Nor. Car.) 380; where in a similar case it was held the judgment against the principal was extinguished by the payment of the judgment against the surety.

[2] Neal *v.* Nash, 23 Ohio St. 483; Goodyear *v.* Watson, 14 Barb. (N. Y.) 481; Norris *v.* Ham, R. M. Charlton (Ga.) 267; Norris *v.* Evans, 2 B. Mon. (Ky.) 84.

[3] Thomson *v.* Palmer, 3 Richardson Eq. (So. Car.) 139.

[4] Mechanic's Bank *v.* Hazard, 13 Johns. 353.

[5] McDougald *v.* Dougherty, 14 Ga. 674.

§ 272. **Cases holding that payment of amount of judgment by surety extinguishes it, and prevents subrogation thereto.**—On the other hand, there is a class of cases which hold that where a judgment is rendered against principal and surety, payment of the amount by the surety extinguishes the judgment, and the surety can thereafter derive no benefits therefrom by means of subrogation.[1] This doctrine has been carried to the extent of holding that the surety who paid a joint judgment against himself and his principal extinguished it, even though he did not intend to do so, and took an assignment of it to himself. The court said that the only way he could keep the judgment alive was to have it assigned to some third person.[2] Where a judgment was recovered and execution issued against the maker and several indorsers of a note, among whom was R, a mere accommodation indorser, who paid the judgment, it was held that a court of law had no power to permit him to sue out execution against the parties to the judgment, who stood prior to him on the note. Payment extinguished the judgment at law, and he could only be subrogated, if at all, in equity.[3] Principal and sureties in a promissory note were sued jointly, and judgment and *fi. fa.* went against them jointly. The sureties paid the *fi. fa.*, and the sheriff made an entry to that effect on it. Held, the sureties had no right to have the *fi. fa.* returned and take out a *ca. sa.* and arrest the principal.[4]

§ 273. **Whether surety who pays specialty debt of principal entitled to rank as specialty creditor.**—Although there is conflict of authority on this point also, the prevailing and better opinion is that the surety who pays the sealed obligation of his principal, does not, in the absence of an intention to that effect, thereby extinguish the same and become a simple contract creditor of the principal, but that he is, by reason of such payment, subrogated to the rights of the creditor in the sealed instrument, and entitled to rank as a specialty creditor of the principal. In holding this principle, an able court said that the civil law, the old English authorities, and the great weight of American

[1] Laval v. Rowley, 17 Ind. 36; Morrison v. Marvin, 6 Ala. 797; State v. Miller, 5 Blackf. (Ind.) 381; McKee v. Amonett, 6 La. An. 207; Dinkins v. Bailey, 23 Miss. 284.

[2] Briley v. Sugg, 1 Dev. & Batt. Eq. (Nor. Car.) 366. To similar effect, see Presslar v. Stallworth, 37 Ala. 402.

[3] Ontario Bank v. Walker, 1 Hill (N. Y.) 652.

[4] Elam v. Rawson, 21 Ga. 139.

authority, held the surety entitled to subrogation to the very place with all the rights of the creditor, while the later English cases held that payment by the surety extinguished the specialty and left the surety a simple contract creditor. "The rights of the surety in this matter depend on no subtle technicality, but upon an equity which springs out of the fact of payment, and out of his relation to the principal debtor." At common law the specialty may be extinguished, but in equity the surety is regarded as a purchaser thereof. A purchaser of a negotiable security would acquire all the rights of the creditor. How can he occupy a position in a court of equity more favorable than the surety? The surety is universally held to have the same rights as to collateral securities as the creditor, and to have the right to be subrogated to them. The principles of national justice and reason pass them to him. "The substitution of the surety is not for the creditor as he stands related to the principal after payment, but as he stood related to him before the payment. He is substituted to such rights as the creditor then had against the principal, one of which unquestionably was to enforce his bond against the principal, and if he was insolvent, to be let in as a bond creditor." By doing this no one is injured any more than if the creditor had himself enforced payment against the principal as a bond creditor.[1] As already said, there is a class of cases which hold that payment of a specialty by a surety extinguishes it so as to prevent any subrogation thereto, and this, though the intention be not to extinguish it, and the surety take an assignment of it to himself. The general rule that the surety is entitled to subrogation to the securities held by the creditor, is admitted, but it has been said that this rule must be qualified

[1] Per Nisbet J. in Lumpkin *v.* Mills, 4 Ga. 343; holding the same thing, see Powell's Exrs. *v.* White, 11 Leigh (Va.) 309; Davis *v.* Smith, 5 Ga. 274; Tinsley *v.* Oliver's Admr., 5 Munf. (Va.) 419; *ex parte* Ware, 5 Richardson Eq. (So. Car.) 473; Grider *v.* Payne, 9 Dana (Ky.) 188; Shultz *v.* Carter, Speer's Eq. (So. Car.) 533. Holding that the surety will be ranked as a specialty creditor when necessary to his protection, and otherwise not, see Kendrick *v.* Forney, 22 Gratt. (Va.) 748. Holding that a surety will be subrogated to the benefit of a recognizance when it is not extinguished at law, see Salkeld *v.* Abbott, Hayes (Irish) 576. As to subrogation to promissory note by party who pays the same, see Rockingham Bank *v.* Claggett, 29 New Hamp. 292. To prevent the bar of the statute of limitations, see Smith *v.* Swain, 7 Richardson Eq. (So. Car.) 112.

"by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor." [1]

§ 274. **Surety entitled to subrogation to all securities held by creditor—General observations—English statute.**—When it is conceded that on principles of natural justice the surety who has paid the debt is equitably entitled to the securities therefor held by the creditor, it seems that the same reasons which entitle him to any of the securities entitle him to all of them. It is difficult to conceive of any equitable reason why one security for the debt should be extinguished by payment more than another; and the whole doctrine of subrogation is one of equity. A note, bond, mortgage, pledge and judgment are all equally securities for the debt, and collateral to it. If payment by the surety extinguishes one of them, why does it not extinguish them all? The reasoning which makes a distinction is highly technical, and certainly has no foundation in equity. This subject has been set at rest in England by act of Parliament, which provides that: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him; provided always that no co-surety, co-contractor or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means afore-

[1] Copis *v.* Middleton, 1 Turner & Russ. 224, per Ld. Eldon, C.; Jones *v.* Davids, 4 Russell, 277; Hodgson *v.* Shaw, 3 Mylne & Keen 183; Foster *v.* Trustees of Athenaeum, 3 Ala. 302; Bledsoe *v.* Nixon, 68 Nor. Car. 521, Buckner *v.* Morris, 2 J. J. Marsh (Ky.) 121.

said, more than the just proportion to which, as between those parties themselves, such last mentioned person shall be justly liable."[1]

§ 275. **Surety who pays entitled to subrogation to mortgage given by principal to creditor for security of debt.**—A surety who pays the debt of his principal is entitled to subrogation to a mortgage given by the principal to the creditor for the security of the debt,[2] and he may, with[3] or without[4] a formal assignment, thereof, have the same foreclosed in his own name, for his benefit. He cannot, however, usually enforce a mortgage or lien given for the security of the debt, unless he first pays the debt.[5] A being indebted to B, gave him a chattel mortgage on certain property to secure the debt. C was a surety for the same debt and was obliged to pay it, and took an assignment of the mortgage from B. During the continuance of the mortgage, D took the property included in the mortgage and converted it, and C sued D for the property. Held, he was entitled to recover its value from D.[6] The surety who pays a debt secured by mortgage, will, by means of subrogation thereto, have preference over a subsequent mortgage on the same property, given by the principal to the creditor to secure a subsequent debt.[7] Thus, A mortgaged his freehold and copyhold estates to C to secure 6,000*l*., and B (A's daughter) by the same mortgage conveyed her freehold and copyhold estate to secure A's debt. It was provided in the mortgage that A's property should be primarily liable for the 6,000*l*. Afterwards A made a second mortgage on his same property to secure a further loan of 700*l*. made him by C. Held, C was not entitled as against B to tack his second mortgage to the first, but that B was entitled to redeem the first mortgage upon payment of the 6,000*l*. C, when he took the second mortgage, had full knowledge of all the facts, "and, therefore, he could only take subject to such rights as the daughters had acquired by reason of their

[1] Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, sec. 5.

[2] Gossin *v*. Brown, 11 Pa. St. 527; Jacques *v*. Fackney, 64 Ill. 87; Copis *v*. Middleton, 2 Turner & Russ. 224; Fawcetts *v*. Kimmey, 33 Ala. 261; Miller *v*. Pendleton, 4 Hen. & Munf. (Va.) 436.

[3] Norton *v*. Soule, 2 Greenl. (Me.) 341.

[4] McLean *v*. Towle, 3 Sandf. Ch. R. 117.

[5] Conwell *v*. McCowan, 53 Ill. 363; Lee *v*. Griffin, 31 Miss. 632.

[6] Lewis *v*. Palmer, 28 New York, 271.

[7] To this general effect, see National Exchange Bank *v*. Silliman, 65 New York, 475.

having concurred in the former deed. Now, it is quite clear that a surety paying of the debt of his principal, is entitled to a transfer of all the securities held by the creditor, in order that he may make them available against the debtor as the original creditor might have done. * The equity gives to the surety a right to call for a transfer of the securities, and so binds those securities into whatever hands they may come, with notice of the charge."[1] So where a surety, on a note secured by mortgage on the land of the principal, paid the note, and the creditor, without the assent of the surety, entered satisfaction of the mortgage, so as to leave the same subject to the lien of a subsequent judgment recovered by the creditor against the principal, and proceeded to levy the same upon the land, it was held that the mortgage having been given to secure the debt, was as much for the benefit of the surety as the creditor, and the surety having paid the debt, was entitled to the benefit of the mortgage to the extent of his payment, and this right was prior to the lien of the judgment, and the land having been sold under a power in a prior mortgage, leaving a surplus, the surety was entitled to receive such surplus to reimburse himself for what he had so paid.[2] A having obtained from B the advance of money, conveyed certain lands by way of mortgage to secure the amount. C as surety for A, conveyed a charge of 5,000*l.* further, to secure the debt. The proviso of redemption was conditioned, that if A or C, or either of them, should on a day therein named, repay B the sum borrowed, B would re-convey the lands and charges on the uses on which they had been held before the execution of the deed. The period of redemption having expired, the debt was paid out of C's charges. Held, that notwithstanding the form of the proviso of redemption, C was entitled to the benefit of B's securities on A's lands.[3] Where one of two joint sureties, holding a mortgage on property given to them jointly by the principal for their indemnity, pays a part of the debt, and releases a part of the mortgaged property, the other surety may oppose the value of the property released to that amount of the claim against him for contribution. The co-surety who makes such payment, ac-

[1] Bowker *v.* Bull, 1 Simons (N. S.) 29, per Lord Cranworth, V. C.; to contrary effect, see Williams *v.* Owen, 13 Simons, 597.

[2] City National Bank of Ottawa *v.* Dudgeon, 65 Ill. 11.

[3] M'Neale *v.* Reed, 7 Irish, Ch. Rep. 251.

quires in equity an exclusive right to that amount of the property mortgaged for their security.[1] P made a mortgage to R to indemnify him as surety for several debts. For some of these debts M became bound as P's surety, and thereby released R from such debts as he (M) became bound for. There did not appear to have been any agreement for an assignment of the mortgage to M, and if there was such an agreement it had not been carried out. Held, that to the extent that M became bound and released R, the lien of the mortgage was extinguished, both as to R and the creditor, and therefore M could not as to such debts be subrogated to it.[2]

§ 276. **Indemnitor of surety who pays debt entitled to subrogation—Subrogation against third parties with notice—Marshaling assets—Vendor's lien.**—A party who agrees to indemnify a surety against loss by reason of his obligation as surety, and who afterwards pays the debt for which the surety is bound, is entitled to subrogation, the same as the surety would have been if he had paid the debt. His equities are the same as the sureties would have been, and the payment by him is not in such case voluntary.[3] A surety being entitled to the benefit of all the secureties for the debt which are available for his indemnity, a person taking any of such securities from the principal, with notice of the facts, is bound in equity to hold them for the indemnity of the surety, and subject to all the equities which the sureties could originally enforce. Where there are a first and second mortgage on real estate to secure debts due different parties, and a surety for the debt secured by the first mortgage pays it, but the holder of the second mortgage, with knowledge of the first mortgage, gets the legal title, such surety has to the extent of the amount paid by him a priority in the land over the holder of the second mortgage.[4] Equity will not marshal assets to the prejudice of a surety so as to destroy his right to subrogation. Thus, A was indebted to B, and placed in his hands property to pay the debt, and C also mortgaged his land to secure the same debt. B

[1] Roberts v. Sayre, 6 T. B. Mon.(Ky.) 188.

[2] Hunter v. Richardson, 1 Duvall (Ky.) 247; to a contrary effect, where a third person paid the debt for which the surety was liable under an agreement that the mortgage for indemnity should be assigned to him, see Brien v. Smith, 9 Watts & Serg. (Pa.) 78.

[3] Rittenhouse v. Levering, 6 Watts & Serg. (Pa.) 190.

[4] Drew v. Lockett, 32 Beavan, 499.

obtained judgment for the debt against A, and other creditors of A obtained subsequent judgments against him. The subsequent judgment creditors filed a bill to have the secureties marshaled, and sought to have B's debt satisfied out of the premises mortgaged by C. Held, they were not entitled to the relief. If C had paid the debt, he would have been entitled to subrogation to B's judgment against A, and moreover, if the marshaling was allowed, the effect would be to compel C to pay the subsequent judgment creditors.[1] Two judgments were recovered for the same debt, one against A, the principal, and the other against B, a surety, which became liens on the land of each of them. Afterwards B mortgaged a piece of land to C, and afterwards D recovered a judgment against A. Then D purchased the judgments against A and B first mentioned, and sold property of A on the last judgment, more than enough to satisfy the first judgments and applied the money to the payment of the last judgment. D then levied an execution issued on the first judgment against B on the land mortgaged to C. Held, that C's equity in the mortgaged premises was superior to D's. The property of A was the primary fund for the payment of the first judgments, and after D bought the judgments he stood in the place of the original holder, and must apply the money realized from the sale to the payment of the first judgments, which were a first lien on the land of A.[2] As the surety by means of subrogation stands in the very place of the creditor, he cannot occupy any better position than the creditor did at the time the debt was paid to him.[3] Where a party bought a piece of land and gave a note for the purchase money with a surety on the note, and the land was conveyed to the purchaser by deed, and no mortgage was taken to secure the note, it was held that the vendor by taking the note with surety had waived his vendor's lien, and the surety could not by suit in chancery have the land sold and applied to the payment of the debt, so as to cut off subsequent judgment creditors of the principal.[4] Where land is sold and the purchaser gives bond with surety for the payment of the pur-

[1] Joseph v. Heaton, 5 Grant's Ch. R. 636.

[2] Wise v. Shepherd, 13 Ill. 41.

[3] Houston v. Branch Bank at Huntsville, 25 Ala. 250.

[4] Bradford Admr. v. Marvin, 2 Fla. 463. To similar effect, see Miller v. Miller, Phillips Eq. (Nor. Car.) 85; see, also, Henley v. Stemmons, 4 B. Mon. (Ky.) 131 where it is held that payment by a surety extinguishes a vendor's lien.

chase money, and the title is retained as a further security for its payment, the surety for the original purchase money has the first equity to be indemnified, and his claim is preferred to that of a purchaser of the equity of redemption at a sheriff's sale or of any subsequent incumbrancer.[1]

§ 277. **Subrogation of sheriff's sureties.**—Where a sheriff sold land on a decree of partition, and took a note for the purchase money, and his sureties were obliged to pay the heirs the money for which the land sold, it was held that such sureties were entitled to be subrogated to all the rights in the note which such heirs had, and to prosecute a suit in the name of the sheriff, and have the proceeds of the note.[2] Where a sheriff falsely returned that he had made an execution, and one of his sureties paid the plaintiff in execution the amount thereof, it was held that he was entitled to have the sheriff's return set aside, and a new execution issued against the defendant in the judgment, although the sheriff had confessed a judgment in favor of his sureties for a sum including the above mentioned sum paid by the surety, but such judgment had not been paid.[3] Execution was issued against A, and placed in the hands of the sheriff, who failed to make due return, and judgment was therefore rendered against the sheriff and his sureties for the amount of the execution, which the sureties paid: Held, they were entitled, without obtaining any judgment, to file a bill to be subrogated to the rights of the creditor in the judgment against A, and to enforce such judgment against certain effects of A liable thereto. The court said: "This right of substitution subsists in favor of a person who is compelled to pay the debt of another in order to protect his own interest."[4] A sheriff appointed a deputy, who gave bond with surety, and collected money and used it. The sureties of the sheriff were obliged to pay the money thus collected, and the sheriff being insolvent, it was held that they were entitled to file a bill against, and obtain indemnity from, the surety on the bond of the deputy for the money thus paid by them.[5] A recovered a judgment

[1] Shoffner *v.* Fogleman, Winston Law & Eq. (Nor. Car.) 12. On same subject, see Ghiselin *v.* Fergusson, 4 Harris & Johns. (Md.) 522; Burk *v.* Chrisman, 3 B. Mon. (Ky.) 50.

[2] Sweet, Admr. *v.* Jeffries, 48 Mo. 279.

[3] Saint *v.* Ledyard, 14 Ala. 244.

[4] Bittick *v.* Wilkins, 7 Heisk. (Tenn.) 307, per Deadrick, J. To contrary effect, see Stout *v.* Dilts, 1 Southard (N. J.) 218.

[5] Brinson *v.* Thomas, 2 Jones Eq. (Nor. Car.) 414; Blalock *v.* Peake, 3 Jones Eq. (Nor. Car.) 323.

against B, and execution was issued and delivered to the sheriff, who levied on a county order as the property of B, and turned the same over to A, who credited the execution for that amount. C sued the sheriff and his sureties for the order, claiming that it was his, and recovered, and the sureties paid the judgment against them and the sheriff, and sued A for the amount of the order: Held, they were entitled to recover. The order belonged to C, and he might have sued A for it instead of the sheriff and his sureties, and it was proper that the sureties who had paid the value of the order, should be subrogated to the claim of C against A, and permitted to enforce it.[1]

§ 278. **Subrogation of sureties of administrator and of county and city treasurer.**—Where an administrator being about to leave the state, deposits the assets of the estate with a person in trust, that he will pay the next of kin of the intestate, the sureties of such administrator, who have been obliged to pay judgments recovered against them by the next of kin, have a right to call upon the trustee for the assets so received by him, and have a right to be subrogated to the rights of such of the next of kin as have made them responsible.[2] Where an administrator pays debts of the intestate, to an amount exceeding the assets, he may subject the real estate in the hands of the heirs to his reimbursement, and the surety of an administrator who has so disbursed his funds, may be subrogated to the rights of his principal.[3] Where the note of a deceased debtor was paid by the note of his administratrix, and both notes were indorsed by the same surety, who was obliged to pay the last note, it was held that such surety could not by suit in chancery, enforce the first note against the estate of the principal, as it had been paid and extinguished. But if the estate was in any manner indebted to the administratrix, the surety might, by reason of his suretyship for the administratrix, reach the estate in that way to the amount of such indebtedness.[4] The law provided that a county treasurer should give two bonds, one to the state, and one to the county, and this was done. The county was by law liable to the state, for money collected by the treasurer for the state. The treas-

[1] Skiff *v.* Cross, 21 Iowa, 459.

[2] Kennedy *v.* Pickens, 3 Ired. Eq. (No. Car.) 147.

[3] Taylor *v.* Taylor, 8 B. Mon. (Ky.) 419; see, also, Schoolfield's Admr. *v.* Rudd, 9 B. Mon. (Ky.) 291.

[4] Brown *v.* Lang, 4 Ala. 50.

urer became a defaulter to the state, and the county paid the amount of the defalcation. Held, the county was entitled to recover against the sureties on the bond to the state.[1] Certain parties became the sureties of a city treasurer. The treasurer deposited a large sum of money in a bank, which belonged to the city, and for which it might have sued the bank. The treasurer made default, and the sureties paid the amount of the defalcation, and claimed to be subrogated to the rights of the city against the bank. It was contended that they could only be subrogated to the rights of the city against the treasurer, but the court held them entitled to subrogation to the rights of the city against the bank, and said, "The equities of sureties to subrogation extends not only to the rights of the creditor as against the principal, but to all rights of the creditor respecting the debt which the sureties pay.[2]

§ 279. **Surety for part of debt no right to subrogation to securities for another part of same debt—Similar cases.**—A surety for a part of a debt is not entitled to the benefit of a security given by the debtor to the creditor at another time for a separate and distinct part of the same debt.[3] Defendants lent A at the same time two sums, one of 2,000*l.* and one of 3,000*l.*, each on separate and distinct securities, and the plaintiff was surety for the 2,000*l.*, but not for the other sum. Held, that the plaintiff on paying the 2,000*l.* was not entitled to have the securities therefor transferred to him until the 3,000*l.* also were paid. The court said, that as against the principal it was well settled that the creditor could tack his claims and retain all the securities till the 3,000*l.* were paid. A surety upon paying the debt is entitled to all the securities held by the creditor, "provided the creditor has no lien upon them or right to make them available against the principal debtor, to enforce the payment of a debt different from that which the surety has paid. But if the creditor has such a right and one arising out of the transaction itself, of which the suretyship forms a part, then the right of the surety to the benefit of these securities is subordinate to the right of the creditor to make them available for the payment of his other claims, and can only be made available after the paramount right is satis-

[1] Elder *v.* Commonwealth, 55 Pa. St. 485.

[2] City of Keokuk *v.* Love, 31 Iowa, 119.

[3] Wade *v.* Coope, 2 Simons, 155.

fied."[1] A being indebted to B, lodged several securities with him as collateral for that debt; A afterwards borrowed a further sum of money from B, for which C became his surety, but there was no express agreement that the securities already deposited should cover the latter advance. A became bankrupt, and B called upon C to pay the second debt. The securities in the hands of B were more than sufficient to pay the first debt, and it was held that C should be allowed the surplus in reduction of the second debt.[2]

§ 280. **When surety subrogated to creditors' right to set aside fraudulent conveyances by principal—Other cases.**—Where principal and surety were liable for a debt and the principal conveyed certain slaves without consideration, and the surety was afterwards obliged to pay the debt, it was held that he had the same right to file a bill to set aside the conveyance of the slaves as fraudulent, that the creditor had before payment by the surety.[3] It has been held that two co-sureties who have paid the debt of the principal, may jointly file a bill to be subrogated to a lien of the creditor, for the debt on land of the principal.[4] It has also been held that a surety who contests his liability, and a trustee to whom property has been conveyed for the indemnity of such surety, cannot be joined as defendants in the same suit.[5] A gave a mortgage to B, who was his surety on a note, to indemnify him from loss as such, which mortgage was conditioned to be void if A should pay or satisfy the note by renewal or otherwise. A renewed the note with different sureties, and B assigned the mortgage to the new sureties. Before such assignment A had mortgaged the premises to C. Held, that C was entitled to hold the property. The first mortgage became *functus officio* and had performed its office by its terms when the note was renewed. A new mortgage then given would not have taken precedence over the mortgage given to C, and an assignment of the old one gave no greater rights.[6]

[1] Farebrother *v.* Wodenhouse, 23 Beavan, 18, per Sir John Romilly, M. R. To the effect, that surety who pays the bond of himself and principal is entitled to suborgation to former bond for same debt given by principal, see Hodgson *v.* Shaw, 3 Mylne & Keen, 183.

[2] Praed *v.* Gardiner, 2 Cox, 86.

[3] Tatum *v.* Tatum, I Ired. Eq. (Nor. Car.) 113. In Sanders *v.* Watson, 14 Ala. 198, it was held that a surety who paid a judgment against himself and principal, extinguished the judgment, and that he could not file a bill to set aside a fraudulent conveyance by the principal without first getting a judgment against him.

[4] Kleiser *v.* Scott. 6 Dana (Ky.) 137.

[5] People *v.* Skidmore, 17 Cal. 260

[6] Bonham *v.* Galloway, 13 Ill. 68.

A as principal and B as surety executed a bond to C, conditioned to make a title to land on payment of the purchase money. Before the purchase-money was all paid, the land was sold at sheriff's sale, to satisfy executions against A who became insolvent. C sued B for a failure to make title to the land, and recovered. Held, that B, to the extent of the money thus paid by him, had a right to follow the land into the hands of the purchaser at sheriff's sale. He was entitled to subrogation to the right which C had to file a bill for specific performance, and follow the land.[1]

§ 281. **When surety not entitled to subrogation as against special bail of the principal for the same debt—Other cases.**—Separate suits on a bond were brought against the principal A and the surety B, and A was held to bail, and gave C as surety in the bail bond. D bought the judgments which were recovered in the suits, and was about to proceed against B, when he filed a bill and offered to pay what remained due on the judgment against him, and claimed to be subrogated to the rights of the creditor against C. Held, the right of subrogation did not exist, as C had not been fixed as bail when B offered to pay the judgment.[2] A, B and C being joint surities, judgment was rendered against them, which became a lien on the land of each. Afterwards A sold his land to D, and B and C became insolvent, and sold their land to F. Execution was issued by the creditor and levied on the land purchased by D, who paid the entire debt, and requested the creditor to assign the judgment to him, which request was refused. D then filed his bill against the creditor, and B, C and F, to subject the the land sold by B and C to F, to the payment of two-thirds of the debt paid by

[1] Freeman *v.* Mebane, 2 Jones, Eq. (Nor. Car.) 44. For other cases of surety's right to subrogation, see Silk *v.* Eyre, Irish Rep. 9 Eq. 393; Wright *v.* Morley, 11 Vesey, 12. Holding that an accommodation acceptor of a bill of exchange is not, under certain peculiar circumstances, entitled to subrogation to mortgage for indemnity of accommodation indorser of same bill, see Gomez *v.* Lazarus 1 Dev. Eq. (Nor. Car.) 205. Holding that a creditor of a partnership can be compelled to proceed against surviving partner, who has funds of the firm in his hands sufficient to pay the debt, before proceeding against property conveyed by dead partner in his life-time, as indemnity for his surety, see Newsom *v.* McLendon, 6 Georgia, 392. As to right of guarantor who pays debts of a firm to come on property bought by one partner with supposed profits of the firm, see Greene's Exrs. *v.* Ferrie, 1 Desaussure, (So. Car.) 164.

[2] Creager *v.* Brengle, 5 Harris & Johns. (Md.) 234.

him, and it was held he was entitled to the relief sought. The Court said: "While he would have no redress at law in such a case, equity in furtherance of justice, will subrogate him to the rights of his grantor, and charge the land bound by the lien in the hands of the other sureties, or their grantees, who purchased with notice."[1] Judgment was recovered against principal and surety for $1,900. Property of the surety was sold on execution, which realized $815.93, which was applied on the judgment. Afterwards the property of the principal was sold, and realized enough to pay the balance of said judgment, and all other judgments, against the principal of prior or equal date, and left money enough in the hands of the creditor to repay the surety the amount realized from the sale of his property. Held, that the surety's right to this money was superior to the right of the creditor to retain it to pay a subsequent debt due by the principal, to the creditor.[2]

§ 282. **When creditor entitled to securities given by principal to surety for his indemnity.**—As a general rule, where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness the principal creditor is in equity entitled to the full benefit of that security, and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence. The authorities place the principle upon the ground that as the secur-

[1] Furnold *v.* The Bank of the State of Missouri, 44 Mo. 336.

[2] Hardcastle *v.* Commercial Bank, 1 Harrington (Del.) 374; National Exchange Bank *v.* Silliman, 65 New York, 475. Holding that a creditor of a surety is entitled to be subrogated to a judgment which the surety's property has paid, in preference to a subsequent creditor, to whom the surety has assigned his right to subrogation, see Huston's Appeal, 69 Pa. St. 485, overruling Harrisburg Bank *v.* German, 3 Pa. St., 300. For a questionable case, holding that the equity of a purchaser from a purchaser of land who had not paid for it, has a prior claim on the land to a surety for the purchase money who has paid the same, see Rush *v.* The State, 20 Ind. 432. For a case deciding that under its peculiar circumstances the holder of a bill could not be subrogated to a mortgage given for the indemnity of an accommodation acceptor, see St. Louis Building and Savings Assn. *v* Clark, 36 Mo. 601. For a peculiar case, in which a surety was held entitled to subrogation to a mortgage given by the principal after the surety became liable, and after another mortgage on the same property for a less number and aggregate amount of debts had been canceled, see Cory *v.* Leonard, 56 New York, 494.

ity is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him."[1] The right of the creditor is the same when the security is a mortgage or other lien given the surety by the principal after the principal and surety have both become bound, even though there may have been no previous agreement that indemnity should be given.[2] To entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his remedies at law, or have reduced his debt to judgment.[3] A mortgage given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and lien which subsists after the creditor's claim on the surety for payment of the note is barred at law by the statute of limitations, and though the fee of the mortgaged property has by foreclosure become vested in the surety. The trust, which inures to the benefit of the creditor, subsists till the debt is paid, and may be enforced against any one who takes the property with notice.[4] After a trust of this kind has been created, it cannot usually be defeated without the consent of all parties in interest, unless it be by a conveyance to a *bona fide* purchaser without notice.[5] Special circumstances may create an exception to this rule. Thus J mortgaged certain real estate to B, to indemnify him for drafts which he accepted as J's surety. Afterwards B mortgaged to Q all his interest in the property mortgaged to him for indemnity, to secure a loan made by Q to J. It was the intention of

[1] Kramer & Rahm's Appeal, 37 Pa. St. 71 per Thompson, J.; Curtis *v.* Tyler, 9 Paige Ch. R. 432; New London Bank *v.* Lee, 11 Ct. 112; Rice's Appeal, 79 Pa. St. 168; Owens *v.* Miller, 29 Md. 144; Seibert *v.* True, 8 Kansas, 52; Saylors *v.* Saylors, 3 Heisk. (Tenn.) 525; Seibert *v.* Thompson, 8 Kansas, 65; Branch *v.* The Macon & Brunswick R. R. Co. 2 Woods, 385.

[2] Paris *v.* Hulett, 26 Vt. 308; Darst *v.* Bates, 51 Ill. 439; Saylors *v.* Saylors, 3 Heisk. (Tenn.) 525; Burroughs *v.* United States, 2 Paine, 569; Haven *v.* Foley, 18 Mo. 136; Troy *v.* Smith, 33 Ala. 469; Vail *v.* Foster, 4 New York, 312.

[3] Saffold *v.* Wade's Exr. 61 Ala. 214; Kinsey *v.* McDearmon, 5 Cold. (Tenn.) 392.

[4] Eastman *v.* Foster, 8 Met. (Mass.) 19. Explaining above, and refusing relief to creditor where there was still a debt due from principal to surety, see First Congregational Society *v.* Snow, 1 Cush. 510; to same effect as Eastman *v.* Foster, where principal conveyed property to trustee, for indemnity of surety, see Cullum *v.* Branch Bank at Mobile, 23 Ala. 797.

[5] Ross *v.* Wilson, 7 Smedes & Mar. (Miss.) 753; Carpenter *v.* Bowen, 42 Miss. 28.

all the parties to the transaction to give Q a first lien on the premises. J and B were then both solvent, but afterwards failed, at which time the debt of Q was unpaid, as were the acceptances of B under the original mortgage. Certain holders of such acceptances filed a bill against Q to subject the mortgaged premises to the payment of the acceptances held by them. Held, they were not entitled to relief. The first mortgage was made for the personal security of B, and while J and B were solvent no equities arose in favor of the acceptors, and while no such equities existed, B had a right to surrender the security or make such disposition of it as he saw proper.[1]

§ 283. **When creditor entitled to securities given by principal to surety for his indemnity.**—If the principal confesses a judgment in favor of the surety, for his indemnity, and the surety afterwards dies, and his estate is thereby discharged from liability, it has been held that the creditor is nevertheless entitled to the benefit of the judgment.[2] Where a principal mortgaged property to a surety, for his indemnity, and also to secure a debt due the surety and the surety afterwards became insolvent and assigned all his effects, it was held that the creditor (to indemnify the surety against whose debt the mortgage had been given) was entitled to a preference in the mortgaged premises, over the assignee holding the debt due from the principal to the surety, also secured by the mortgage.[3] A mortgage was given a surety, by the principal, to secure him against loss, on account of several claims for which he was surety, and also to secure a debt due the surety by the principal. The surety was discharged from his liability as such, by time given the principal. Held, that the proceeds of the mortgaged property should be applied *pro rata* to the payment of all the debts.[4] A being the surety of B in two obligations, B entered into a bond, with C as his surety, conditioned to save and keep harmless A, on account of his suretyship, and to

[1] Jones *v.* Quinnipaick Bank, 29 Ct. 25.

[2] Crosby *v.* Crafts, 5 Hun. (N.Y) 327. To a similar effect, and holding that surety may, before paying the debt, assign such a judgment to the creditor, and that the creditor may enforce it, see Bank *v.* Douglass, 4 Watts (Pa.) 95.

[3] TenEyck *v.* Holmes, 3 Sandf. Ch. R. 428. To a similar effect, and holding that the right of the creditor to the security does not depend upon the liability of the surety to be damnified, see Ohio Life Ins. Co. *v.* Ledyard, 8 Ala. 866.

[4] Helm's Admr. *v.* Young, 9 B. Mon. (Ky.) 394.

obtain his release from the two obligations. A was sued on the obligations, and judgment was recovered against him, and he being insolvent, the bond of indemnity was assigned to the creditor, and he sued C on it, claiming that it was a fund in the hands of A for the payment of the debt, which he was entitled to reach. The court said that the bond of indemnity was not given simply for the personal indemnity of the surety, for the release of the two obligations could not be obtained without the consent of the creditor, and as the two obligations had not been released, it was held the bond of indemnity was forfeited, and the creditor might recover on it against C.[1] When a mortgage, given by a principal to his surety for indemnity, is informally assigned by the surety to the creditor, such assignment will be upheld in equity.[2] A guarantied the debt of B by parol, and B placed in A's hands, collaterals for his indemnity, from which A realized a sum in money. The creditor sued A for the debt. Held, he could not recover on the guaranty, because of the statute of frauds, but could recover for money had and received, to the extent of the money received by A as above.[3] Where joint judgment is recovered against principal and surety, and the lands of the principal are sold at sheriff's sale, and the proceeds applied to the payment of such judgment, the judgment creditors of the surety have an equity to be subrogated, as against the principal, to the debt thus created against the principal and in favor of the surety, and to the lien of the judgment against the principal and surety, and to have priority of claim in the order of their respective judgments to the extent that they were deprived of the proceeds of the surety's lands by reason of the judgment against the principal and surety. "Where the joint debt ought to be paid by one of the debtors, a court of equity will so marshal the securities as to compel the joint creditors to have recourse to that debtor, so as to leave the estate of the other open to the claims of his individual creditors; or, if the joint creditor has already appropriated the latter fund, it will permit the several creditors to come in *pro tanto*, by way of subrogation, upon the fund which ought to have paid the joint debt."[4] Where a debtor conveyed to trustees certain property for the indemnity of various sureties of his who were bound for

[1] King *v.* Harman's Heirs, 6 La. (Curry) 607.

[2] Carlisle *v.* Wilkins' Admr. 51 Ala. 371.

[3] Jack *v.* Morrison, 48 Pa. St. 113.

[4] Neff *v.* Miller, 8 Pa. St. 347.

different debts, it was held that one of the creditors might, in his own name, sustain a suit in chancery for the distribution of the property against all other parties concerned.[1] Where the guardian of several wards gave a separate bond to each ward, with different sureties on each bond, and conveyed to each of the sureties separately different pieces of property for their indemnity, it was held that the wards could not bring a joint suit against the surties jointly for subrogation.[2]

§ 284. **Creditor cannot avail himself of personal indemnity given surety unless surety could have done so.**—The right of the creditor to reach securities provided by the principal for the indemnity of the surety, depends in many cases on the terms of the agreement for indemnity, and the time when such right of the creditor is sought to be enforced. The law on this subject has been thus well summarized: "The extent of the burdens, trusts and conditions annexed to a grant, is to be learned by reading the instrument and gathering from it its intent and purpose. * In subrogating * the creditor to the surety's place as to any indemnity given him, there can be neither increase or diminution of rights, as they actually existed in favor of the surety. If, therefore, the indemnity is against a contingent liability, there can be no substitution until the liability has become absolute. * If a mortgage or other security is given to the surety not to secure the debt or provide a fund for its payment, but to save harmless from a contingent liability or loss, that contingency must come or the injury be sustained, before a right to the indemnity inures to the creditor. Where the contract is for the personal benefit of the surety in opposition to the idea of a pledge for the debt or providing means for its payment, the creditor can claim only such rights and remedies as the surety had. If he has not been damnified and the conditions of the mortgage or other contract of indemnity are unbroken, the surety himself could assert no remedy, nor could the creditor claiming through him and in his stead have substitution. * If, however, the principal has assigned a fund for the payment of the debt and the surety pays it, he is entitled to reimbursement out of the fund."[3] Where a debtor mortgaged property to his indorser to

[1] Bank of United States v. Stewart, 4 Dana (Ky.) 27.

[2] Norton v. Miller, 25 Ark. 108.

[3] Osborn v. Noble, 46 Miss. 449, per Simrall, J., where a creditor was held not entitled to subrogation to a fund

indemnify him against liability on his indorsement, it was held that the creditors could not in chancery have the mortgage foreclosed where no judgment had been rendered against either principal or surety, and both were solvent. The court said the mortgage was not given to secure the debt nor to raise a fund for its payment, or the mortgagee might be held to be a trustee for the creditors; and proceeded as follows: The creditors "seek in this case to be substituted to the rights of * (the surety) in a contract made with him personally for his own benefit, and they can only claim such rights as have inured to him; he has not been damnified; the conditions of the mortgage are unbroken as to him; he can yet assert no claim under them nor could * (the creditors) by being substituted to his place."[1]

§ 285. **Creditor cannot be subrogated to personal indemnity of surety after surety is discharged.**—Where the security is merely personal to the surety, and cannot be construed as a pledge for the security of the debt, if the surety is discharged from liability the creditor cannot afterwards take anything by subrogation to his rights. The obvious reason for this is that the surety being discharged cannot be damnified, and the creditor claiming only through the surety, and occupying his place, can have no greater rights than he. If, on the other hand, the security is a pledge for the payment of the debt as well as a personal indemnity for the surety, the discharge of the surety will not deprive the creditor of a claim on the security for the payment of the debt. This result is not in such case due to a subrogation of the creditor to the rights of the surety, but to the fact that the principal has created a trust fund for the payment of the debt, and the creditor may enforce such trust notwithstanding the discharge of the surety. Certain parties became sureties of another on notes for property purchased, and took a chattel mortgage from their principal for indemnity against loss on account of that and other suretyship ob-

provided for the personal indemnity of the surety. To similar effect, see Homer *v.* Savings Bank, 7 Ct. 478; see, also, VanOrden *v.* Durham, 35 Cal. 136. Holding that creditor whose debt is extinguished is not entitled to subrogation to indemnity of surety, Watson *v.* Rose's Exrs. 51 Ala. 292.

[1] Ohio Life Ins. & Trust Co. *v.* Reeder, 18 Ohio, 35. To the same effect, where a trust deed was given conditioned for the indemnity of the surety in case judgment was had against him and no judgment was rendered, but both principal and surety were discharged in bankruptcy, Bush *v.* Stamps, 26 Miss. 463; Bibb *v.* Martin, 14 Smedes & Mar. (Miss.) 87.

ligations assumed by them for the principal. The principal purchased more goods from the creditor upon the representation that he would get the notes of the sureties for both purchases, and the creditor thereupon canceled the notes which the sureties had signed, and bills were sent to the sureties for the whole amount of the purchases, which they refused to accept. Held, that the sureties being discharged the creditor could not be subrogated to, and enforce the mortgages given for, their personal indemnity.[1] A surety received a promissory note from the principal as an indemnity against loss from an indorsement. This note he afterwards handed over to the creditor as a collateral security for the debt, and the creditor brought suit on it. Pending such suit the statute of limitations became a bar to a recovery against the surety on the note which he had endorsed. This fact was pleaded *puis darrein continuance*, and it was held that as the creditor took the note as collateral security merely, and stood in the place of the surety, and the surety had been released from liability and could not recover on the note for his indemnity, the creditor could not recover on it.[2] When the rents arising from certain property were pledged to a surety for the payment of the debt, and the surety afterwards became invested with the legal title to the property, it was held that the pledge was merged and could not afterwards be asserted by the creditor.[3]

[1] Constant *v.* Matteson, 22 Ill. 546.

[2] Russell *v.* La Roque, 13 Ala. 149. For other cases, holding that when surety is discharged creditor cannot enforce a security given for his indemnity, see Havens *v.* Foudry, 4 Met. (Ky.) 247; Bank of Virginia *v.* Boisseau, 12 Leigh (Va.) 387; Hopewell *v.* Bank of Cumberland, 10 Leigh (Va.) 206.

[3] Rankin *v.* Wilsey, 17 Iowa, 463.

CHAPTER XIII.

OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY PAYMENT.

§ 286. **How payments made by the principal should be applied.**—When the liability of a surety or guarantor is for the debt of another, such liability of course ceases upon the payment of the debt. With reference to the application of payments, the general and well known rule is, that a debtor who owes several debts to the same creditor has the right at the time of making a payment, to apply it to any one of the debts he pleases. If he makes no appropriation of a general payment, the creditor may apply it as he sees fit. And where it is not appropriated by either the debtor or the creditor, the law will apply it according to the justice and equity of the case. The mere fact that there is a surety for one of the debts will not make any difference in this rule, when a payment is made by the principal.[1] Where the principal debtor pays part of the principal sum due, and the whole of a highly usurious rate of interest stipulated for, the

[1] Allen v. Culver, 3 Denio, 284; Pemberton v. Oakes, 4 Russell, 154.

surety is bound by this application of payment.[1] Where a mortgage or other security is given by a principal to secure several debts due one creditor, for one of which debts a surety is liable, and there is no agreement nor anything to indicate the intent of the parties as to how the proceeds of the security shall be applied, the creditor may apply such proceeds to the payment of the debts, for which the surety is not liable.[2] Where three notes are secured by a trust deed, and the two first due are also signed by a surety, the creditor may, after the maturity of all the notes, apply the proceeds of the trust premises to the payment of the note last due, on which there is no surety. The fact that he required sureties on the two first notes, was evidence that he was not satisfied with the security of the trust deed.[3] Principal and surety were liable for a debt, and afterwards the principal obtained further advances from the creditor, at the same depositing with him certain copper to secure his indebtedness, but without specifying what indebtedness. The principal failed, and the creditor, against the objection of the surety, applied the proceeds of the copper to the payment of the subsequent advances. Held, he might lawfully do so. As the principal made no application of the payment, the creditor had the right to apply it as he pleased, "upon the ordinary principle which entitles a creditor in the absence of any direction from the debtor paying, to apply the money he receives to whichever of several debts arising he pleases."[4] Where part of a guaranty was as follows: "I guaranty to you the payment of any debt which he, the principal, may contract with you from time to time, as a running balance of account to any amount not exceeding 400*l*.," and the principal became indebted in 625*l*., and afterwards, by composition with his creditors, paid enough to reduce the whole claim to 356*l*., it was held that the guarantor was entitled to a ratable proportion of the dividend paid by the debtor,

[1] Allen *v.* Jones, 8 Minn. 202.

[2] Stamford Bank *v.* Benedict, 15 Ct. 437; Martin *v.* Pope, 6 Ala. 532; Gaston *v.* Barney, 11 Ohio St. 506.

[3] Mathews *v.* Switzler, 46 Mo. 301. But where the notes secured by the mortgage are part those of the mortgagor alone, on which there is a surety, and part those of the mortgagor and another on which there is no surety, it has been held that the proceeds must be applied to the payment of the notes on which there is a surety; Merrimack County Bank *v.* Brown, 12 New Hamp. 320.

[4] Per Dr. Lushington, in the Bank of Bengal *v.* Radakissen Mitter, 4 Moore's Privy Council Cas. 140.

and was only liable for so much of the 400*l.* as remained after deducting such proportion.[1] It has also been held that the assignee of two judgments from different plaintiffs against the same defendant, on the older of which judgments there is a surety, and on the younger of which there is none, must apply the money raised by the sheriff from a sale of the defendant's property to the discharge of the older judgment.[2]

§ 287. **How the law will apply payments in certain cases.**— Where neither the principal debtor nor the creditor applies the payment, the law will apply it according to the justice of the case. A principal owed the creditor for rent for three years, the rent of the first year being secured by bond with surety. The creditor owed the principal on an account running through the three years, the account of the first year being less than that year's rent; and the whole account being larger: Held, the whole account should be first appropriated to the first year's rent. The court said that where the parties made no application of payments, the law would generally appropriate them to the oldest indebtedness.[3] Where an account is delivered by an agent, in which he charges himself with a balance, and he continues to receive money for his principal, his subsequent payments are not necessarily to be applied to the extinction of the previous balance where the subsequent receipts are equal to the subsequent payments; and the court left it to the jury to say, under all the circumstances, how the payments should be applied.[4] Security was given by a surety for goods to be supplied to his principal, it being stipulated that the security should not apply to a then existing debt. Goods were subsequently supplied to the principal, and payments made by him from time to time, in respect to some of which a discount was allowed for prompt payment. There was no express evidence of application of payments by any one; but the court thought, from the course of dealing, that the intention was to apply the payments to the latter items for which the surety was liable, and it was held that they should be so applied.[5]

[1] Bardwell *v.* Lydall, 7 Bing. 489; *Id.* 5 Moore & Payne, 327.

[2] Simmons *v.* Cates, 56 Ga. 609.

[3] Hollister *v.* Davis, 54 Pa. St. 508. Holding that where no application has been made, and there is a running account, and payments made from time to time, the first payments made will be applied to the oldest item of indebtedness, see Pemberton *v.* Oakes, 4 Russell, 154.

[4] Lysaght *v.* Walker, 5 Bligh (N. R.) 1.

[5] Maryatts *v.* White, 2 Starkie, 101.

§ 288. **What will amount to payment—Special instances.**—Questions sometimes arise as to what constitutes payment of the debt. It has been held that a levy of an execution on property of the principal, and advertising it for sale, is not such a satisfaction of the debt as will prevent a levy on property of the principal for the same debt.[1] But it has been held that the imprisonment of the principal on execution for the debt is, so long as it continues, a satisfaction of the debt, which bars the creditor for that time from all other remedy therefor.[2] If the holder of a note agree to release the principal upon payment of one-half the amount due, and such payment is made, neither the principal nor surety is discharged from the balance of the note because there is no consideration for the agreement.[3] Where a party signs a note for a certain amount, for one-half of which he is principal, and for the other half surety, payment by him of the half for which he is principal, and a receipt by the creditor in full for such half does not discharge him from the other half.[4] It has been held that if a party guaranty a mortgage, and die, and the mortgage afterwards becomes the property of his estate, the guaranty is extinguished and cannot thereafter be enforced if assigned by the administrator of the estate to a third person.[5] Where a surety pays the creditor a certain amount to release him from obligation as such, the amount so paid cannot be applied as a payment on the debt in favor of the principal.[6] A surety may pay the debt for which he is contingently liable, so as to satisfy the requirements of section nineteen of the United States bankrupt act by giving his individual note therefor, if such note is expressly received as payment.[7]

§ 289. **If debt once paid, it cannot be revived against surety—Special instances.**—When a bond upon which a surety is liable has once been paid by the application of certain funds to that purpose, as agreed between the principal and creditor, they cannot afterwards by agreement between themselves apply the sum received in payment to another purpose so as to charge a surety on the bond.[8] Where the principal in a note pays it with

[1] Fuller *v.* Loring, 42 Me. 481. To same effect, where creditor distrained property of principal for rent, see King *v.* Blackmore, 72 Pa. St. 347.

[2] Koening *v.* Steckel, 58 N. Y. 475.

[3] Oberndorff *v.* Union Bank, 31 Md. 126.

[4] Sterling *v.* Stewart, 74 Pa. St. 445.

[5] Fluck *v.* Hager, 51 Pa. St. 459.

[6] Peer *v.* Kean, 14 Mich. 354.

[7] *In re* Morrill, 2 Sawyer, 356.

[8] Woodman *v.* Mooring, 3 Dev. Law (Nor. Car.) 237. To same effect, see Gibson *v.* Rix, 32 Vt. 824.

money furnished him by a third party, and takes it up without any assignment of it being made, the debt is discharged, and the party who furnished the money cannot afterwards recover on the note against the surety therein.[1] So a surety who is directly and originally liable on a note, cannot, after he has paid such note, reissue it so as to bind any but himself, but it may be otherwise if he is an indorser and only secondarily liable.[2] A principal delivered to the creditor certain hogs, more than sufficient to pay the debt, under an agreement that so much of the proceeds as were sufficient to pay the debt should be applied to that purpose. Afterwards, without the consent of the surety, the creditor suffered the principal to sell the hogs and retain a portion of the proceeds, leaving a part of the debt unsatisfied. Held, the surety was discharged, as the facts constituted a payment of the original debt, and amounted to a new loan of a part of the proceeds of the hogs to the principal.[3] Where a treasurer was a banker and issued his own notes as money, and such notes were received as payment of money for which he was accountable, and the treasurer failed, and such notes were not paid, it was held that the payments in these notes constituted a sufficient payment to discharge the sureties, as the parties receiving the notes might have had gold if they had demanded it.[4]

§ 290. **When payment made by principal and accepted by creditor, does not discharge surety.**—Under certain circumstances payment made by a principal and accepted by the creditor, but from which the creditor derives no benefit, will not discharge the surety. Thus, the payee of a promissory note signed by a principal and surety, accepted the amount thereof from the principal in good faith, and without notice, that the payment was a fraudulent preference. The principal afterwards entered into a composition deed for the benefit of his creditors; the trustees under the deed avoided the payment as a fraudulent preference, and the payee handed over the amount to the trustees. The payee then sued the surety on the note, and it was held he was liable. The court said: "The act of the creditor which discharges the surety must be an act involving something inequitable at the time it is

[1] Eastman v. Plumer, 32 New Hamp. 238.

[2] Hopkins v. Farwell, 32 New Hamp. 425.

[3] Ruble v. Norman, 7 Bush (Ky.) 582.

[4] Guardians of Litchfield Union v. Green, 1 Hurl. & Nor. 884.

done, and which interferes with the rights of a surety; an acceptance of money from a debtor, which the creditor thought at the time he accepted it was good and valid payment, cannot therefore discharge the surety. The creditor under present circumstances could not have refused to accept the money; its acceptance was an advantage, not an injury to the surety."[1] The same thing was held where a note signed by principal and surety was paid by a note which was void for usury, and was taken up and canceled. The court, after reviewing many cases, said: "The principle to be extracted from these cases is, that the usurious contract being utterly void, does not extinguish or affect the original valid contract. In other words, that a non-existing contract cannot extinguish an entity. * There must be two valid subsisting obligations, the one to be extinguished and the other to be substituted for it. Hence, if at the time of the new oblition the former constituted no debt, or if, on the other hand, the new obligation was void, there was no novation. The effect of novation is that the prior obligation, together with its accessions and privileges, is destroyed, but novation will not take place if the second obligation is void."[2] But where principal and surety are liable for a debt, and execution is issued and levied on property which the principal points out as his, and such property is purchased by the creditor, and the execution is returned satisfied in full, it has been held, that the surety is discharged, even though it turn out that other creditors have a prior lien on the property, and the creditor who purchased it afterwards loses all benefit from it by reason of the enforcement of such prior lien. The decision is put upon the ground that, whenever by an arrangement between the principal and creditor, the creditor accepts anything in satisfaction of the debt, it is thereby discharged and cannot be revived against the surety.[3]

§ 291. **Funds which have been appropriated by the principal for the payment of the debt, cannot be diverted from that pur-**

[1] Petty v. Cooke, Law Rep. 6 Queen's Bench, 790. To the same effect, where money paid by a principal to the creditor is recovered by the assignee in bankruptcy of the principal from the creditor, see Watson v. Poague, 42 Iowa, 582; Pritchard v. Hitchcock, 6 Man. & Gr. 151.

[2] Mitchell v. Cotten, Exr. 2 Florida, 136, per Douglas, C. J. To similar effect, see Williams v. Gilchrist, 11 New Hamp. 535.

[3] Newman v. Hazlerigg, 1 Bush (Ky.) 412.

pose without consent of surety.—Collaterals which are deposited by a principal with a creditor, for the security of a debt for which a surety is liable, cannot afterwards, without the consent of the surety, be applied to the payment of another debt, which the principal subsequently becomes liable to pay the creditor.[1] The plaintiff was surety on a promissory note to the defendants, for a sum lent by them to their tenant, and the defendants, also, without the knowledge of the plaintiff, took a mortgage of the tenant's furniture to secure the same debt. The defendants afterwards, under a distress proceeding, took the same furniture for arrears of rent due from the tenant to the defendants. Held, that the proceeds of the furniture were first applicable to the payment of the note, and the defendants could not, as against the surety, apply them in payment of the rent, and this upon the principle that a surety is entitled to the benefit of all securities held by the creditor for the payment of the debt, whether he has notice of them or not.[2] In holding the same thing, another court said: "The equity which entitles a surety to the benefit of all securities of the principal deposited with the creditor to assure payment of the debt, is wholly independent of any contract between the surety and the creditor, and indeed of any knowledge on the part of the surety of the deposit of the securities. * In such case, the creditor is regarded as a trustee of the security deposited with him for the benefit of all parties known by him to be interested in it, and is bound to administer the trust created by the deposit, unless discharged by the surety, in his relief as well as in accordance with his own interests and those of the principal. It follows that any application of the security by the creditor to other purposes than those marked out by the terms of the deposit, or any decrease of its value by means of his negligence or mistake, discharges the surety from liability to him in that character to the extent of the misapplication, or decrease of value thus occasioned."[3] Where a principal agreed with his sureties that the proceeds of certain bark should be applied to the payment of the debt, and the creditor assented that it should be so applied, but was no further a party to the agreement, it was

[1] Donally v. Wilson, 5 Leigh (Va.) 329. To a similar effect, see Mellendy v. Austin, 69 Ill. 15.

[2] Pearl v. Deacon, 24 Beavan, 186; affirmed, Pearl v. Deacon, 1 De Gex & Jones, 461.

[3] Hidden v. Bishop, 5 Rhode Is. 29, per Ames, C. J.

held that such proceeds could not afterwards, without the consent of the sureties, be diverted to the payment of another debt. The court said: "If he (the creditor) has in any way assented to the application of the fund to the particular debt, with notice that such direction was given to it to indemnify sureties, or if he received the fund with that understanding, he has acquiesced in the agreement of the principal with his sureties, and it is not in the power of either to change it without the assent of the others."[1]

§ 292. **When debt is paid by principal, surety discharged, no matter where money came from—When creditor obliged to retain money in his hands belonging to principal.**—The original defendants in a supersedeas judgment borrowed the money from A to pay the judgment, and paid it, at the same time having it assigned to A. Held, the sureties in the supersedeas were discharged. Payment by the principal, no matter where he got the money, discharged the sureties. The principal had no authority "to pledge the responsibility of the superseders who had become his sureties, and whom in law and justice he was bound to save harmless."[2] Where a judgment against principal and surety was transferred to a third person, who paid for it with money borrowed on the note of the principal, it was held that the judgment must be regarded as paid, and equity would restrain its collection from the surety.[3] Where the administrator of an estate sued the surety on a note payable to the deceased, and the principal in the note was an heir of the deceased and entitled to a share in the estate, and was insolvent, it was held the administrator had a right to apply the principal's share in the estate to the payment of the note, and would be obliged to do so before proceeding against the surety.[4] A bank held the note of a principal and surety, and shortly after the note became due it had funds in its possession belonging to the principal, which it did not apply (nor did it appear that it had any special right to apply) to the discharge of the note, and did not communicate to the surety for three years the fact that the note was not paid; it was held that the surety was not discharged. The Court said: "It would be essentially altering the position of parties to estab-

[1] Baugher's Exrs. v. Duphorn, 9 Gill (Md.) 314, per Frick, J.

[2] Burnet v. Courts, 5 Harr. & Johns (Md.) 78, per Dorsey, J.

[3] Felch v. Lee, 15 Wis. 265.

[4] Wright v. Austin, 56 Barb. (N.Y.) 13

lish that, because a banker, who holds a note of a third person for a customer, has a balance in his hands in the customer's favor, at the maturity of the note such third person is thereby discharged, if it turns out that the note was given by him as surety." [1]

§ 293. **Cases holding surety discharged by payment under special circumstances.**—A guaranty was as follows: "Wm. P. Wilson has this day purchased of R. S. Eddy & Co. $617.35 dry goods, and I bind myself to pay to said R. S. Eddy & Co., or see that said Wilson does, the sum of $400 within 90 days from this date." Within the ninety days Wilson paid Eddy & Co. $200. Held, this should be applied on the sum due on the guaranty.[2] A statute gave the United States priority over the other creditors of revenue officers. Such an officer had given an official bond with sureties for $10,000. Being largely indebted to the government, he made a trust deed of his property to secure the United States, and left $10,000 in a trunk for his sureties, with directions that they should take it and relieve themselves from liability. They took the money and paid it to the United States in exoneration of their liability, and took up their bond, the officers of the United States not knowing where the money came from. Held, the sureties were discharged, for while the United States was a preferred creditor, yet no one part of its debt was more preferred than another, and the principal might have applied the $10,000 himself in discharging the sureties if he had seen fit.[3] A banker held two notes, both for the same amount, signed by A, one of which was signed by B as surety, and this note was due seven days after the other. The day after the first note became due, A called to pay it, and paid the amount, but the note on which B was surety was handed him by mistake, and the indorsement of the payee canceled. A took the note and kept it five months, and in the meantime both he and the payee failed. Held, the surety was discharged. The long acquiescence in the payment amounted to a ratification. The surety during all that time might have supposed the debt paid, and been lulled into security, and injured.[4]

[1] Strong v. Foster, 17 Com. Bench (8 J. Scott) 201.

[2] Eddy v. Sturgeon, 15 Mo. 198.

[3] United States v. Cochran, 2 Brockenbrough, 274.

[4] Brown v. Haggerty, 26 Ill. 469. Holding that parol evidence is competent to show that a bond was given as collateral security for a debt, and that the debt is paid, see Chester v. The

§ 294. **How payments by officer applied when he has two different sets of sureties.**—Where there are different sets of sureties for the same officer, covering different periods of time, and payments are made by him, the following has been held to be the rule as to the manner in which they shall be applied: "First, as the debtor may direct, at or before the time of making such payment, and such direction may be given expressly or by implication. Secondly, if the debtor give no such direction, then the creditor may make the application according to his pleasure, and he may make it either at the time of such payment or afterwards, before the commencement of any controversy on the subject, though after he has once made the application, he cannot change it to another without the consent of all other persons concerned. Such application by a creditor may also be made expressly or by implication. * Thirdly, if neither the debtor nor the creditor make the application, then the law will make it according to the circumstances of each particular case, and if there be no other controlling circumstance the application will be made according to the order of time, paying first the oldest debt." But, "if debts are due by a collector or other receiver of money, under bonds, with different sets of sureties (and no application of a payment by the principal is made by him), then the law will so apply the payments, if possible, as that the money collected under one bond shall be applied to the relief of the sureties in that bond, * and the creditor in such case, if he be informed as to the source from which the money with which a payment may have been made was derived, cannot apply it otherwise, even with the consent or by the direction of the principal debtor." If the principal makes an application of the payment at the time of making it, and the officer receiving it did not know where the money came from, such application will stand, even though the money collected by one set of sureties is thus used to exonerate another set of sureties.[1] Where a collector of customs was appointed and served for two successive terms, and gave bond for each term,

Bank of Kingston, 16 New York, 336. Holding that the sureties on a sheriff's official bond must themselves, in order to be discharged, pay the amount of the bond, and cannot take advantage of payments made by the sheriff in that regard, see Moore v. Worsham, 5 Ala. 645.

[1] Per Moncure, J., in Chapman v. The Commonwealth, 25 Gratt. (Va.)

with different sets of sureties, it was held that payments into the treasury of money accruing and received in the second term, should not be applied to the extinguishment of a balance apparently due at the end of the first term; and such money cannot be so applied by the treasury officers, and thus make the sureties in the second bond liable, when, in fact, there has been no defalcation during the term for which they are liable. The liability of the sureties in the two bonds is just as distinct as if two different persons had filled the office during the two terms.[1] By statute, a postmaster was to render his account every three months, and it was further enacted that if default should be made by the postmaster at any time, and the postmaster general did not bring suit within two years, the sureties of the postmaster should be discharged. Under this statute it was held that where a postmaster in a quarterly return showed a balance in his hands, the postmaster general might apply the balance reported in a subsequent return, to the previous balance; and where, in an account current continued for years, the postmaster general thus made the application of balances reported by a postmaster, any deficiency on final settlement due from the postmaster would be chargeable to his last quarterly accounts; and unless two years had elapsed from the return of the last quarterly account to the time of bringing suit, the above statute would not bar a suit against the sureties.[2]

§ 295. **If principal tender amount of debt to creditor, who refuses to receive it, surety is discharged.**—If the principal, after the debt is due, offers to pay it, and tenders the amount due to the creditor and the creditor refuses to receive it, the surety is discharged. One of the reasons upon which this rule is founded is, that the transaction amounts to a payment of the debt and a new loan to the principal. Moreover, the contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction, and any bad faith on the part of the

721. On same subject, and to same general effect, see Pickering v. Day, 3 Houston (Del.) 474; Myers v. United States, 1 McLain, 493; Stone v. Seymour, 15 Wend. 19; United States v. Linn, 2 McLean, 501. To a contrary effect, see Readfield v. Shaver, 50 Me. 36. See, also, on this subject, Pickering v. Day, 2 Delaware Ch. R. 333; State v. Sooy, 39 New Jer. Law (10 Vroom) 539.

[1] United States v. Eckford's Exrs. 1 Howard (U. S.) 250.

[2] United States v. Kershner, 1 Bond, 432.

creditor will discharge the surety. The surety cannot compel the creditor to receive the money, but his refusal to do so is a fraud on the surety which exposes him to greater risk and operates his discharge. If it were otherwise, the creditor would have it in his power to keep the surety under the cloud of the debt any length of time he might see proper.[1] So, also, if after the debt is due, the surety offers to pay it and the creditor refuses to receive payment, the surety is discharged. In holding this, the court said: "If it is the legal right of the surety to pay the debt and at once proceed against the principal debtor, it necessarily follows that he is entitled to have the money accepted by the creditor in order that he may proceed. It is the duty of the creditor to receive it, and a gross violation of duty and good faith on his part to refuse, thereby interposing an insurmountable obstacle in the way of the pursuit by the surety of his most prompt and efficient remedy."[2] An offer by the principal to pay part of the debt, and a refusal by the creditor to receive it, will not discharge the surety.[3] Where principal and surety signed a joint and several promissory note, and suit was brought thereon against the principal, and pending the suit the surety tendered the amount of the note to the creditor, it was held he was not thereby discharged from liability, unless he also offered to indemnify the creditor against the costs of the action.[4] In order that the tender of payment may have the effect of discharging the surety, the tender must be made in money. Thus, A guarantied B against loss on account of any indorsements which he might make for C and D. Afterwards, B indorsed for C and D, who failed, and offered to pay or secure B, by transferring to him as much of their stock in trade as would secure him the amount for which he was liable, which offer he refused to accept.

[1] Johnson *v.* Ivey, 4 Cold. (Tenn.) 608; McQuesten *v.* Noyes, 6 New Hamp. 19; Sears *v.* Van Dusen, 25 Mich. 351; Joslyn *v.* Eastman, 46 Vt. 258; Musgrave *v.* Glasgow, 3 Ind. 31; Johnson *v.* Mills, 10 Cushing, 503; Curiac *v.* Packard, 29 Cal. 194; *contra*, Clark *v.* Sickler, 64 New York, 231; where, notwithstanding the foregoing cases all previously decided, it was said there was no case holding the surety discharged under such circumstances, and that they were asked to take a new step. See, also, Liebbrandt *v.* Myron Lodge, 61 Ill. 81, where it was held that the surety was not discharged where the principal verbally offered to pay, but did not tender the money.

[2] Hayes *v.* Josephi, 26 Cal. 535, per Sawyer, J.

[3] McCann *v.* Dennett, 13 New Hamp. 528.

[4] Manufacturers' Bank *v.* Billings, 17 Pick. 87.

Held, A was not discharged from his guaranty by such refusal of B.[1] A sheriff having collected money belonging to a party, offered to pay it to him, but the party refused to received it, and the sheriff afterwards absconded without paying it. Held, the sureties on his official bond remained liable for the money. The court said that an official bond is not like an ordinary obligation to pay a debt, for it guaranties against official misconduct: "The fact of tender and refusal does not convert the official trust into a mere private liability for a money demand. The obligation to pay over money received by a sheriff in his official capacity, continues an official duty until performed by payment to the party entitled. * They (the sureties) can find no excuse in the fact that the injured individuals have not been cautious to fortify themselves against official misconduct. Their undertaking is that there shall be no such thing as official misconduct."[2]

[1] Williams v. Reynolds, 11 La. (Curry) 230. To similar effect, Rhinelander v. Barrow, 17 Johns. 538.

[2] State v. Alden, 12 Ohio, 59, per Read, J.

CHAPTER XIV.

OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY THE GIVING OF TIME.

§ 296. **Giving time to the principal discharges the surety—General rule.**—When the obligation of the surety is for the debt of the principal, if the time of payment is without the consent of the surety, by a binding agreement between the creditor and principal, extended for a definite time, the surety is discharged. The reason is, that the surety is bound only by the terms of his written contract, and if those are varied without his consent it is no longer his contract, and he is not bound by it. It therefore follows, that the fact that the principal is insolvent, or that the extension would be a benefit to the surety if he remained bound, makes no difference in the rule. Moreover, the surety has a right when the debt is due, according to the original contract, to pay it, and immediately proceed against the principal for indemnity, and he is deprived of this right by such an extension of the time of payment. As to this rule there is no conflict of authority among well considered cases.[1] The agreement to give time in

[1] Ide *v.* Churchill, 14 Ohio St. 372; Bank of Albion *v.* Burns, 46 New York, 170; Deal *v.* Cochran, 66 Nor. Car. 269; Pipkin *v.* Bond, 5 Ired. E. (Nor. Car.) 91; Haynes *v.* Covington, 9 Smedes & Mar. (Miss.) 470; Wadlington *v.* Gary, 7 Smedes & Mar. (Miss.) 522; Miller *v.* McCan, 7 Paige Ch. R. 451; Sailly *v.* Elmore, 2 Paige Ch. R. 497; Huffman *v.* Hulbert, 13 Wend. 375; Haden *v.* Brown, 18 Ala. 641; King *v.* State Bank, 9 Ark. (4 Eng.) 185; Combe *v.* Woolf, 8 Bing. 156; *Id.* 1 Moore & Scott, 241; Cald-

order to have the effect of discharging the surety must be supported by a sufficient consideration. Otherwise the creditor is not bound by his agreement, and may at any time enforce the collection of the debt, and the surety may at any time pay the debt and proceed against the principal. And the rule is the same if the creditor actually forbears for the length of time which he has agreed without consideration to forbear.[1] It is also well settled, as a general rule, that the mere passive delay of the creditor in proceeding against the principal, however long continued and however injurious it may be to the surety, will not discharge the surety. In such case the contract is not changed, and the surety may at any time pay the debt and proceed against the principal.[2]

well's Exr. v. McVickar, 9 Ark. (4 Eng.) 418; Heath v. Key, 1 Younge & Jer. 434; Ferguson v. State Bank, 8 Ark. (3 Eng.) 416; Branch Bank at Mobile v. James, 9 Ala. 949; Thomas v. Stetson, 59 Me. 229; Callibam v. Tanner, 3 Robinson (La.) 299; Edwards v. Coleman, 6 T. B. Mon. (Ky.) 567; Fuller v. Milford, 2 McLean, 74; Apperson v. Cross, 5 Heisk. (Tenn.) 481; Hill v. Bull, 1 Gilmer, (Va.) 149; Hunter's Admrs. v. Jett, 4 Rand (Va.) 104; Kennebec Bank v. Tuckerman, 5 Greenl. (Me.) 130; Thomas v. Dow, 33 Me. 390; Henderson's, Admr. v. Ardery's Admr. 36 Pa. St. 449; McGuire v. Wooldridge, 6 Robinson, (La.) 47; Lewis v. Harbin, 5 B. Mon. (Ky.) 564; Sparks v. Hall, 4 J. J. Marsh (Ky.) 35; Farmers' & Traders' Bank v. Lucas, 26 Ohio St. 385; Baskin v. Godbe, 1 Utah, 28; Reid v. Watts, 4 J. J. Marsh. (Ky.) 440; Roberts v. Richardson, 39 Iowa, 290; Dillon v. Russell, 5 Nebraska, 484; Crofts v. Johnson, 1 Marshall, 59; Isaac v. Daniel, 8 Adol. & Ell. (N. S.) 500; Ellis v. Bibb, 2 Stew. (Ala.) 63; Taylor v. Burgess, 5 Hurl. & Nor. 1; Allison v. Thomas, 29 La. An. 732; Yeary v. Smith, 45 Texas, 56; Thompson v. Bowne, 39 New Jer. Law (10 Vroom,) 2. But see David v. Malone, 48 Ala. 428.

[1] Fair v. Pengelly, 34 Up. Can. Q. B. R. 611; Ford v. Beard, 31 Mo. 459; Tucker v. Laing, 2 Kay & Johns. 745; Brinagar's Admr. v. Phillips, 1 B. Mon. (Ky.) 283; Zane v. Kennedy, 73 Pa. St. 182; Joslyn v. Smith, 13 Vt. 353; McLemore v. Powell, 12 Wheaton, 554; Sullivan v. Hugely, 48 Ga. 486; Goodwyn v. Hightower, 30 Ga. 249; De Witt v. Bigelow, 11 Ala. 480; Montgomery v. Dillingham, 3 Smedes & Mar. (Miss.) 647; Draper v. Romeyn, 18 Barb. (N. Y.) 166; Roberts v. Stewart, 31 Miss. 664; McDowell v. Bank of Wilmington & Brandywine, 2 Del. Ch. R. 1; M. & M. Bank Wheeling v. Evans, 9 West Va. 373.

[2] Fulton v. Matthews, 15 Johns. 433; Belfast Banking Co. v. Stanley, Irish Rep. 1 Com. Law, 693; Warfield v. Ludewig, 9 Robinson (La.) 240; Moore v. Broussard, 20 Martin (La.) 8 N. S. 277; Force v. Craig, 2 Halstead (N. J.) 272; Jordan v. Trumbo, 6 Gill & Johns. (Md.) 103; United States v. Simpson, 3 Pen. & Watts (Pa.) 437; Buchanan v. Bordley, 4 Harr. & McHen. (Md.) 41; Cope v. Smith's Exrs. 8 Serg. & Rawle (Pa.) 110; Butler v. Hamilton, 2 Desaussure Eq. (So. Car.) 226; Johnson v. Searcy, 4 Yerg. (Tenn.) 182; Creath's Admr. v. Sims, 5 How. (U. S.) 192; Perfect v. Musgrave, 6 Price, 111; Strong v. Foster,

Such forbearance by the creditor, even if continued until the debt is barred as against the principal by the statute of limitations,[1] or if continued for twenty-four years, does not discharge the surety.[2]

§ 297. **Guarantor discharged by time given the principal.**— The rule with reference to the discharge of a surety by the giving of time, is equally applicable to the guarantor of a debt of another.[3] "That a guarantor and an ordinary surety are alike affected by such extension of the time of payment, seems to be required by sound principles of law, and has often been held."[4] Where a party drew an order on a merchant, directing him to furnish goods out of his store to a third person, to a certain amount, engaging to be accountable for such sum, and requesting the amount of the bill to be sent to him, and the merchant furnished goods to such third person to a greater amount, and took his note at thirty days for the debt, it was held that no action accrued under the guaranty. The guaranty was an undertaking to pay for the goods as soon as they were sold, and the giving of time prevented a liability from attaching thereunder.[5] A wrote to B a guaranty for goods to be purchased by C, as follows: "We engage to guaranty to you the payment of any goods you may supply * (C) between 2d of April, 1814, and the 2d of April, 1815." B supplied C goods on the usual credit, and took commercial paper for them, and when the paper became due took for it new paper of C for extended periods. Held, the guaranty was only intended to cover goods sold on the usual time, and that extending the time discharged A, even if it was to his benefit. The Court said: "It cannot be supposed that the plaintiff (A) meant he was to continue liable after the 2d of April, 1815, so long as the defendant (B) might choose to renew the bills of the principal debtor. * The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety."[6]

17 Com. Bench (8 J. Scott) 201; King v. State Bank, 9 Ark. (4 Eng.) 185; Humphreys v. Crane, 5 Cal. 173.

[1] Reid v. Flippen, 47 Ga. 273; Whiting v. Clark, 17 Cal. 407.

[2] Roberts v. Colvin, 3 Gratt. (Va.) 358; Hunt v. Bridgham, 2 Pick. 581.

[3] Campbell v. Baker, 46 Pa. St. 243; Fithian v. Corwin, 17 Ohio St. 118. Holding that a guarantor is not discharged by time given, unless injured, see Follmer v. Dale, 9 Pa. St. 83.

[4] Per Dewey, J. in Chace v. Brooks, 5 Cush. 43.

[5] Hunt v. Smith, 17 Wend. 179.

[6] Samuell v. Howarth, 3 Merivale, 272, per Ld. Eldon.

§ 298. **Surety not discharged unless time extended for a definite period.**—In order that an agreement between the creditor and principal, extending the time of payment shall have the effect of discharging the surety or guarantor, the extention must be for a definite time. It makes no difference for how short a period the time is extended, but that period must be fixed, otherwise the hands of the creditor are not tied, and he may proceed at any time.[1] Thus, the surety is not discharged by an agreement by the creditor to wait "awhile longer." How long is awhile longer? "It may be a moment, an hour, a day, or a year. Who can determine it, and on what evidence can it be determined. * If such a contract were valid in other respects, it must be void, because no man can tell from the proof what it is, and it cannot therefore be enforced."[2] So, an agreement "to give time for payment beyond the day of maturity of the notes," does not discharge the surety. "Such a stipulation is void for uncertainty; it amounts to nothing more than a general promise of indulgence, and can tie up the hands of no one."[3] But where the holder of a bill after its maturity agreed with the maker to wait till the drawer could be heard from, it was held that the time of indulgence was sufficiently definite to discharge the indorser.[4] It has been held that an agreement to extend the time of payment "to the Summer" of a given year, means until the first day of June of that year, and "until the Fall," means until the first day of September, and is sufficiently certain to discharge a surety.[5] But it has also been held, that an agreement to extend the time of payment till "some time in the Summer" is not sufficiently definite.[6] Under certain circumstances a guarantor will be discharged by time given, though no term of credit is stipulated in the guaranty. Thus, the defendant guarantied the payment for

[1] Freeland v. Compton, 30 Miss. 424; Menifee v. Clark, 35 Ind. 304; Board of Police of Clark Co. v. Covington, 26 Miss. 470; Gardner v. Watson, 13 Ill. 347; Thornton v. Dabney, 23 Miss. 559; Alcock v. Hill, 4 Leigh (Va.) 622; McGee v. Metcalf, 12 Smedes & Mar. (Miss.) 535; Hayes v. Wells, 34 Md. 512; Parnell v. Price, 3 Richardson Law (So. Car.) 121; Woolfolk v. Plant, 46 Ga. 422; Bucklen v. Huff, 53 Ind. 474. To a contrary effect, see Cox v. Mobile & Girard R. R. Co. 37 Ala. 320.

[2] Jenkins v. Clarkson, 7 Ohio 72, per Wood, J.

[3] Ward v. Wick Bros. 17 Ohio St. 159, per Scott, J.

[4] Rupert v. Grant, 6 Smedes & Mar. (Miss.) 433. Overruling another point decided in this case, see Roberts v. Stewart, 31 Miss. 664.

[5] Abel v. Alexander, 45 Ind. 523.

[6] Miller v. Stem, 2 Pa. St. 286.

porter to be delivered by the plaintiff to J, but the guaranty contained no stipulation as to the credit to be given. The plaintiff's custom was to give six months' credit, and then, sometimes, to take a bill at two months. The plaintiff sold the porter and waited nine months, and then took a bill at two months for the price, thus giving eleven months credit. Held, the guarantor was discharged. The court said: "In the present case, though no specific time of payment is fixed by the guaranty, yet it must be implied that the guaranty was given on the supposition that the debtor would not have more than the usual credit." [1]

§ 299. **If surety consent to extension before or at the time it is given, he is not discharged thereby.**—The surety, who at the time of or before an extension is granted to the principal, consents to the same, is not discharged thereby.[2] The fact that a surety has consented to one extension will not authorize any other extension. He has a right to stand upon the terms of his contract as altered by his consent, and any other extension will discharge him the same as if he had never consented to any.[3] But where a surety in a replevin bond wrote to the plaintiff, giving his consent to a stay of execution till April 1st following, and longer if the principal asked it, and the principal continued from time to time to ask and receive indulgence from April 1st, 1860, to May, 1864, when execution was issued, which was enjoined by the surety, it was held that the letter of the surety authorized the extensions, and the surety was not discharged.[4] If the surety knows of the extension at the time it is given, it is not necessary that he should object thereto in order to entitle him to his discharge.[5] And even if he signs the agreement for extension as a witness, that fact will not prevent his discharge by such extension.[6] The court said that if his intention had been to consent to the extension, he would have signed it as a maker, and not as wit-

[1] Per Tindal, C. J., in Combe *v.* Woolf, 8 Bing. 156; *Id.* 1 Moore & Scott, 241.

[2] Treat *v.* Smith, 54 Me. 112; Wolf *v.* Finks, 1 Pa. St. 435; Hunter's Admr. *v.* Jett, 4 Rand. (Va.) 104; Wright *v.* Storrs, 6 Bosw. (N. Y.) 600; Baldwin *v.* Western Reserve Bank, 5 Ohio, 273.

[3] Lime Rock Bank *v.* Mallett, 34 Me. 547; Merrimack County Bank *v.* Brown, 12 New Hamp. 320; Gray's Exrs. *v.* Brown, 22 Ala. 262.

[4] Furber *v.* Bassett, 2 Duvall (Ky.) 433.

[5] Stewart *v.* Parker, 55 Ga. 656; Exrs. of Riggins *v.* Brown, 12 Ga. 271.

[6] Edwards *v.* Coleman, 6 T. B. Mon. (Ky.) 567, per Bibb, C.

ness. The fact that he signed as a witness went to show that it was thought he was a disinterested party. If he is bound at all, his "concurrence must bind him by the terms of the new (contract). It is not enough to bind him that he is informed, and is passive; he is not required to object or protest; he must actively concur and consent to be bound by the terms of the new agreement." The assent of a surety to an extension of time may be proved like other facts, by circumstantial evidence, and it has been held that a "regular usage of a bank to receive payment by instalments, or checks at sixty or ninety days, or whatever length of time such regular rule prescribes, with interest on the balance in advance, furnishes presumptive evidence of assent of those who become parties to notes payable to the bank, that the payment may be delayed and received in instalments according to such usage, until the contrary is shown." But the usage must be so general and uniform, as to be presumptively known to those who deal with the bank.[1] Where from the circumstances of the case there was no probability that the surety knew of the usage, the court held that he was not bound by it, and was discharged by time given the principal.[2] If one of two sureties consent to the giving of time, and the other does not, the latter is discharged, and the former cannot recover contribution from him.[3] Where the indorser of a note due April 2d had been duly notified of the default of the principal, and afterwards agreed in writing on the back of the note to be holden as indorser until April 5th, it was held that the second indorsement did not discharge the liability under the first, and that the indorser was liable on both indorsements.[4] If the principal obtains from the creditor an extension of time upon the false representation that the surety has authorized him to do so, and the surety afterwards refuses to consent to such extension, it has been held that the creditor may repudiate the agreement, in which case the surety will not be discharged unless the creditor proceeds to act under the agreement after notice that the surety had not assented thereto.[5]

[1] Per Parker, C. J. in Crosby v. Wyatt, 10 New Hamp. 318. To the same effect, where the surety had been a director, and known the usage of the bank, see Stafford Bank v. Crosby, 8 Greenl. (Me.) 191.

[2] New Hampshire Savings Bank v. Ela, 11 New Hamp. 335.

[3] Crosby v. Wyatt, 10 New Hamp. 318.

[4] Smith v. Hawkins, 6 Ct. 444.

[5] Bangs v. Strong, 10 Paige Ch. R. 11.

§ 300. **When surety not discharged if he promise to pay the debt after time is given.**—If after time has been given the principal, such as would entitle the surety to his discharge, the surety, with a full knowledge of the facts, but without any new consideration, promise to pay the debt, he will remain liable therefor. The action in such case is upon the original obligation, and not upon the new promise. "The promise is valid, not as the constitution of a new, but the revival of an old debt."[1] It has been said that "The right of discharge in such case from the mere fact of the extension of time, is a personal privilege of the surety, which he may waive, and he does so emphatically, if, with knowledge of the fact, he notwithstanding renews his promise."[2] If the surety does not know that time has been given, and makes a new promise without consideration to pay the debt, he is not bound thereby, and he will be discharged, notwithstanding such promise.[3] But if a surety has been discharged by the giving of time, and afterwards, without a knowledge of the facts, but on a new and independent consideration agrees to remain bound, he will be held. "It is not like a case of a new promise or acknowledgment of liability, without any consideration. * Before he enters into a new agreement upon a new consideration, he should inquire, at the peril of being held thereby to have waived his right, to insist upon the discharge if he neglects the inquiry."[4] Where a surety on a bond gave a creditor an agreement "to take no advantage of any indulgence which * (the creditor) may have given heretofore, or may hereafter give to * (the principal) on said bond," it was held that such agreement was a waiver of a defense on account of time given on a valuable consideration, as well as on account of time given without consideration.[5] It has been held that the consent of a surety to a prolongation of time given to the principal will not be inferred, from the fact that the surety told the creditor when called upon

[1] Smith *v.* Winter, 4 Mees. & Wels. 454; Porter *v.* Hodenpuyl, 9 Mich. 11; Ellis *v.* Bibb, 2 Stew. (Ala.) 63; First National Bank, Monmouth *v.* Whitman, 66 Ill. 331; *contra,* Walters *v.* Swallow, 6 Wharton (Pa.) 446.

[2] Per Parker, C. J. in Fowler *v.* Brooks, 13 New Hamp. 240; Rindskopf *v.* Doman, 28 Ohio St. 516.

[3] Merrimack County Bank *v.* Brown, 12 New Hamp. 320; Montgomery *v.* Hamilton, 43 Ind. 451; Kerr *v.* Cameron, 19 Up. Can. Q. B. R. 366.

[4] New Hampshire Savings Bank *v.* Colcord, 15 New Hamp. 119.

[5] Crutcher *v.* Trabue, 5 Dana (Ky.) 80.

for payment, that she could not pay it then, but that she would agree to any arrangement for her made by the principal, unless it be proved that the principal in making the agreement for extension, acted as the agent of the surety.[1] It has been said that, "The fact that the surety takes security from the principal to indemnify him against his liability, * (for the debt) without any communication with the creditor, is not a renewal of his promise. It is perfectly consistent with a determination to avail himself of his right to a discharge. It may well be but a wise precaution against the contingency, that he may not be able to substantiate his claim to be exonerated from the payment of the debt."[2]

§ 301. **Surety discharged by valid agreement to give time, even though remedy of creditor not suspended thereby.**—An agreement upon valid consideration by a creditor not to sue the principal for a stated time, discharges the surety, even though such agreement cannot be specifically enforced. With reference to this it has been said: "It must be admitted that a valid agreement not to sue for a debt for a limited time cannot be pleaded in bar of an action brought for the debt within the time. * But still the law is well settled that such an agreement by a creditor with his principal debtor discharges the surety. It is said that such agreement ties up the hands of the creditor, because, if he breaks it, he may be sued for damages."[3] It has also been said that: "It is sufficient if the contract between the creditor and the principal for the extension of time be such as to give the principal a legal remedy upon it. The doctrine, which is derived from chancery, is founded on the obligation which the contract for delay imposes upon the conscience of the creditor to perform it."[4] If the holder of a note payable on demand makes a valid agreement with the principal to receive payments by yearly instalments, he thereby discharges the surety. In such a case it was argued that the note might be sued, notwithstanding the agreement, and the only remedy of the principal would be a suit for damages for the breach of the agreement. But the court said: "That argument ought not to prevail, for it would be founded

[1] Deuil v. Martel, 10 La. An. 643.

[2] Per Parker, C. J. in Fowler v. Brooks, 13 New Hamp. 240.

[3] Per Blackford, J. in Harbert v Dumont, 3 Ind. 346. To same effect, see Greely v. Dow, 2 Met. (Mass.) 176; Dickerson v. Commissioners of Ripley Co. 6 Ind. 128.

[4] Per Hall, J. in Austin v. Dorwin, 21 Vt. 38.

upon a presumption of the creditors' own wrong. It is not to be presumed that the agreement will be violated on the part of the creditors."[1]

§ 302. **Surety who is fully indemnified is not discharged by the giving of time.**—If the surety is fully indemnified by property of the principal placed in his hands, or mortgaged to him for that purpose, he is not discharged from liability by an extension afterwards granted to the principal.[2] In one case this was put upon the ground that the surety, under such circumstances, became the principal when he received the indemnity.[3] In another case it was said that: "The taking by the sureties of a deed of trust or mortgage from the principal debtor, to secure them against liability, and ample for that purpose, is in effect an appropriation by them of that portion of the effects of the principal to the payment of this debt.[4] But where a surety, after his release, by an extension of time given the principal, received from the principal an indemnity against liability, without the knowledge of the creditor, and subsequently surrendered the same to the principal, it was held that he might still avail himself of his release by the time given. The court said that taking the indemnity did not amount to a new promise, but was a precaution against the contingency that he might not be able to substantiate his defense.[5] W signed a note with, and as surety for, two others, and received from the payee the money for which the note was given, and retained it until one of the principals gave him a note against a third person for his indemnity, and he then paid the money over to the principals. Afterwards the time of payment of the note signed by W, as surety, was extended. Held, that neither the circumstance of his receiving the money, nor his holding the indemnifying note, precluded him from availing himself of the extension of time as a discharge. The court said that while he held the money he could not claim the privileges of a surety, but when he paid it over, it was the same as if he had never held it.[6]

§ 303. **How liability of principal affected by time given a surety, and of surety by time given another surety.**—An agreement

[1] Gifford v. Allen, 3 Met. (Mass.) 255, per Putnam, J.

[2] Kleinhaus v. Generous, 25 Ohio St. 667.

[3] Smith v. Steele, 25 Vt. 427.

[4] Per Ormond, J. in Chilton v. Robbins, 4 Ala. 223.

[5] Rittenhouse v. Kemp, 37 Ind. 258.

[6] Wilson v. Wheeler, 29 Vt. 484.

between the creditor and principal that the surety shall not be sued before a certain time after the debt becomes due, does not entitle the surety to his discharge. It does not prevent the creditor from suing the principal, nor the surety from paying the debt and proceeding against the principal.[1] Where a surety gave the creditor his individual notes, under an agreement between them which was known to the principal, that those notes, when paid, should be in full satisfaction of the original contract, and part only of the notes were paid, it was held that this did not discharge the principal, who might be sued on the original contract, and held for so much as the surety had not paid. The court said that giving time to surety, or making a new contract with him, did not discharge the principal.[2] Where the creditor gave time to one of two solidary co-sureties, it was held that the surety to whom time had not been given was discharged from one-half the debt. The court said that the surety to whom time had not been given, would, upon paying the debt, have been entitled to subrogation to the creditor's right of action against the surety to whom time had been given; and as he was deprived of this right by the giving of time, he was discharged to the extent of one-half the debt.[3] A, B and C were the makers of a note which A assumed to pay, and D became responsible to B and C that A would do so. E guarantied that D would perform his contract. The holder of the note granted D an extension for one year: Held, E was not discharged. The court said the giving of time did not release B and C, and D was bound to indemnify them, and had not done so, and therefore E was liable for this default of D.[4] In another case, A, at the request of B, and on his promise that he would share any loss or liability he might thereby incur, accepted a bill at three months for the accommodation of C. At the maturity of the bill, C being unable to meet it, it was agreed between the holders and A and C, but without the knowledge of B, that another bill should be drawn for the amount, as a substitute for the former acceptance, and this was done. A having been obliged to pay the second bill, sued B for indem-

[1] Armstead *v.* Thomas, 9 Ala. 586; Wilson *v.* Bank of Orleans, 9 Ala. 847.

[2] Emery *v.* Richardson, 61 Me. 99. To similar effect, see Whiting *v.* Western Stage Co. 20 Iowa, 554.

[3] Gosserand *v.* Lacour, 8 La. An. 75. To contrary effect, see Draper *v.* Weld, 13 Gray, 580.

[4] Kennedy *v.* Goss, 38 New York, 330.

nity, and it was held that his liability on his undertaking to indemnify A was not discharged by the renewal of the bill.[1]

§ 304. **Agreement to give time need not be express, nor proved by direct evidence—Special instances of what amounts to giving time.**—The agreement by a creditor to give time to the principal, need not be in express words, in order to discharge the surety. It is sufficient, in that regard, if a mutual understanding and intention to that effect are proved.[2] If the parties act upon the terms of an implied agreement to that effect, it will be sufficient.[3] The holder of a note made upon it several successive indorsements of the words "Received, Renewed." To each of these indorsements a date, subsequent to the maturity of the note, was affixed. Held, that each of the indorsements was equivalent to the words "received the interest for a renewal," and that the word "renewed" might be properly regarded as an agreement to consider the note to be the same as if made in the same terms anew from that date.[4] The following indorsement, made by the holder of a note, due July 5th, 1852, viz.: "Six months further time is given on the within note, and interest paid to January, 3d, 1853," is sufficient evidence of a contract between the holder and the principal for a delay in the payment of the note, and that a prepayment of interest was the consideration therefor.[5] Where the principal in a note requests an extension of time by a letter, accompanied by an inclosure of a sum of money as a consideration for the extension, which extension is not agreed to by the creditor, though he keeps the money and applies it on the debt, without notifying the principal that he will not give the time, these facts do not alone establish a giving of time, and release the surety, where there are other facts which show that time was not given.[6] The principal in a note, before its maturity, sent the holder a letter containing a draft, and stating that he hoped to be able to pay the note soon, in which case the amount of the draft was to be applied in part payment, but that if he could not

[1] Way *v.* Hearn, 11 J. Scott (N. S.) 774; Way *v.* Hearn, 13 J. Scott, (N. S.) 292.

[2] Brooks *v.* Wright, 13 Allen, 72.

[3] Union Bank *v.* McClung, 9 Humph. (Tenn.) 98. Also, as to what amounts to a giving of time, see Ducker *v.* Rapp, 67 New York, 464.

[4] Lime Rock Bank *v.* Mallett, 34 Me. 547; Lime Rock Bank *v.* Mallett, 42 Me. 349.

[5] Dubuisson *v.* Folkes, 30 Miss. 432.

[6] Garton *v.* Union City Bank, 34 Mich. 279.

do so, the holder should take that sum as interest in advance for three months after the maturity of the note. The holder made no reply to this letter, but procured the draft to be cashed, and held the proceeds without making any application thereof upon the note till the expiration of three months after the maturity of the note, when he indorsed it as three months' interest thereon. Held, these facts did not import a binding contract for extension of the time of payment of the note, and the surety was not discharged.[1]

§ 305. **When surety discharged by payment of interest in advance.**—The payment of legal interest on a debt in advance, is a sufficient consideration to support an agreement for an extension of the time of payment thereof.[2] The decided weight of authority, and it seems the better reason, is that the payment in advance of interest on the debt by the principal to the creditor is of itself without more sufficient *prima facie* evidence of an agreement to extend the time of payment for the period for which the interest is paid, and works the discharge of the surety.[3] With reference to this matter it has been said that "the very idea of payment of interest in advance presupposes that delay of the payment of the principal is to be given for that time. The payment of the interest is the consideration for an agreement implied from the transaction itself, if not distinctly expressed, to give time on the principal. The general rule is that the reception of interest in advance upon a note is *prima facie* evidence

[1] Bank of Middlebury *v.* Bingham, 33 Vt. 621.

[2] Rose *v.* Williams, 5 Kansas, 483; Christner *v.* Brown, 16 Iowa, 130; People's Bank *v.* Pearsons, 30 Vt. 711; Warner *v.* Campbell, 26 Ill. 282; Lime Rock Bank *v.* Mallett, 34 Me. 547; Flynn *v.* Mudd, 27 Ill. 323; Dubuisson *v.* Folkes, 30 Miss. 432; Wright *v.* Bartlett, 43 New Hamp. 548.

[3] Woodburn *v.* Carter, 50 Ind. 376; Preston *v.* Henning, 6 Bush (Ky.) 556; Warner *v.* Campbell, 26 Ill. 282; Peoples' Bank *v.* Pearsons, 30 Vt. 711; Crosby *v.* Wyatt, 10 New Hamp. 318; Hamilton *v.* Winterrowd, 43 Ind. 393; New Hampshire Savings Bank *v.* Ela, 11 New Hamp. 335; Jarvis *v.* Hyatt, 43 Ind. 163; Union Bank *v.* McClung, 9 Humph. (Tenn.) 98; Wakefield Bank *v.* Truesdell, 55 Barb. (N. Y.) 602; *contra*, see Freeman's Bank *v.* Rollins, 13 Me. 202, overruling Kennebec Bank *v.* Tuckerman, 5 Greenl. (Me.) 130; Mariner's Bank *v.* Abbott, 28 Me. 280; Hosea *v.* Rowley, 57 Mo. 357; Coster *v.* Mesner, 58 Mo. 549; Agricultural Bank *v.* Bishop, 6 Gray, 317; Oxford Bank *v.* Lewis, 8 Pick. 458; Blackstone Bank *v.* Hill, 10 Pick. 129; Williams *v.* Smith, 48 Me. 135; Crosby *v.* Wyatt, 23 Me. 156. For special case on this subject, see Hansberger's Admr. *v.* Kinney, 13 Gratt. (Va.) 511.

of a binding contract to forbear and delay the time of payment, and no suit can be maintained against the maker during the period for which the interest has been paid, unless the right to sue be reserved by the agreement of the parties. The payment of the interest in advance is not of itself a contract to delay, but is evidence of such contract, and while this evidence may be rebutted, yet in the absence of any rebutting evidence it becomes conclusive."[1] Where a bond creditor, by agreement with the principal, received interest in advance on the bond, it was held that equity would restrain an action on the bond during the period for which interest was paid, and would discharge the surety. The court said: "If in such a case the time for payment of the interest could be explained consistently with the action, that would alter the case; but if it appeared simply that the six months' interest had been given, what could the imagination suggest but a contract *ipsissimis verbis* that the creditor should not sue for that time. Besides, the interest being paid, would a court of equity endure that the creditor should put that interest into his pocket and the next day sue for the principal?"[2] Where the fact of payment of interest in advance, and an agreement to extend the time of payment, are indorsed on the back of a note, but it does not appear by whom the interest was paid, this is not sufficient evidence to discharge the surety, for the interest may have been paid by him.[3] A indorsed a note for the accommodation of a prior indorser, B. When the note becomes due, C, the holder, called on B who asked for time, and gave his note to C for the legal interest on the note for thirty days, which C accepted but did not expressly agree to wait. Held, A was discharged. The court said, that accepting the note for the interest amounted to an agreement to give time, and was as strong an evidence of it as was possible to be given. The consideration was sufficient, because the interest note when it became due would itself bear interest, which would not have been so if the interest had not thus been converted into principal.[4] If the agreement to pay interest for the extended period is for any reason void, the agreement for extension is not binding and the surety is not discharged.[5] If a surety on a note upon which interest has been

[1] Scott *v.* Saffold, 37 Ga. 384.

[2] Blake *v.* White, 1 Younge & Coll. (Exch.) 420.

[3] Cheek *v.* Glass, 3 Ind. 286.

[4] Walters *v.* Swallow, 6 Wharton (Pa.) 446.

[5] Douglass *v.* The State, 44 Ind. 67.

paid from time to time in advance, and so indorsed upon the note, enter into a new contract, by which, for a valuable consideration, he agrees to be holden for the next six years, a copy of the note being inserted in the new contract, he is not discharged by the reception of interest in advance in a similar manner from time to time during said six years. It must be inferred that there was no objection by the surety to such payments in advance, and it is not reasonable to presume that the creditor would be willing to receive no interest for six years.[1]

§ 306. **When payment of part of debt sufficient consideration for giving of time.**—The payment of part of a debt by the principal, at the time or after it becomes due, is not a sufficient consideration to support an agreement for forbearance, and an agreement for forbearance founded upon such consideration, even though carried out by the creditor, will not discharge the surety. In such case, "no benefit is received by the creditor but what he was entitled to under the original contract, and the debtor has parted with nothing but what he was already bound to pay."[2] For the same reason, a payment by the principal debtor of interest which has already accrued, is not a sufficient consideration to support an agreement for forbearance.[3] Payment of part of a debt before it is due, is a sufficient consideratien to support an agreement for delay of payment of the remainder.[4] Where the creditor, in consideration of payment by the principal, of a small portion of the debt one day before it was due, agreed to give one year's time for the payment of the remainder, it was held the surety was discharged. The court said: "Raising the money a single day in advance of the time fixed by the original bill, may

[1] New Hampshire Savings Bank v. Gill, 16 New Hamp. 578.

[2] Roberts v. Stewart, 31 Miss. 664, per Handy, J.; Sharp v. Fagan, 3 Sneed (Tenn.) 541; Halliday v. Hart, 30 New York, 474; Jenkins v. Clarkson, 7 Ohio, 72; Hall v. Constant, 2 Hall (N.Y.) 205; Mathewson v. Strafford Bank, 45 New Hamp. 104. Holding the same thing, when partial payments are made after judgment has been obtained for the debt, see Crawford v. Gaulden, 33 Ga. 173. Holding the same thing, under peculiar circumstances, see Hunt v. Knox, 34 Miss. 655.

[3] Johnston v. Thompson, 4 Watts (Pa.) 446. But where the principal debtor paid part of the principal and all the interest on a note, and an agreement for forbearance was marked on the back of the note, it was held the surety was discharged; see German Savings Assn. v. Helmrick, 57 Mo. 100.

[4] Greely v. Dow, 2 Met. (Mass.) 176; Austin v. Dorwin, 21 Vt. 38; Newsam v. Finch, 25 Barb. (N.Y.) 175.

have been a great inconvenience to the debtor, and, at the same time, a corresponding advantage to the creditor. But the amount of inconvenience on the one side, and advantage on the other, are matters of no importance on a question of this kind. It is sufficient that the one or the other existed in any degree, however slight."[1] The plaintiff (who was payee of a note which was signed by C as principal, and the defendant as surety), being a partner of C, settled his partnership accounts with C before the note became due, and there was found to be $50 due C on account of the partnership. It was then agreed between the plaintiff and C, that this sum should remain in the hands of the plaintiff without interest, until the note became due, and should then be applied as part payment of the note; and the plaintiff promised that he would never call upon the defendant for payment, and would wait upon C three or four years for the remainder. Held, the defendant was discharged, as the contract between the plaintiff and C amounted to a payment of $50 on the note before it was due, and was a good consideration for giving time.[2]

§ 307. **Whether agreement to pay interest for a definite time is sufficient consideration for extension for that period.**—If after a debt bearing interest becomes due, the creditor agrees to extend the time of payment for a definite period and the principal agrees to pay the same rate of interest the debt would otherwise bear for that time, it seems the better opinion that the surety is thereby discharged.[3] The reasoning upon which this rule is founded has been thus well expressed: "It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege at any time of getting rid of the payment of interest by discharging the principal. By this contract the right to interest is secured for a given period, and the right to pay off the principal and get rid of paying the interest is also relinquished for such period. Here then are all the elements of a binding contract."[4] Notwith-

[1] Uhler v. Applegate, 26 Pa. St. 140, per Lewis, C. J.

[2] Whittle v. Skinner, 23 Vt. 531.

[3] Fowler v. Brooks, 13 New Hamp. 240; Chute v. Pattee, 37 Me. 102; Wood v. Newkirk, 15 Ohio St. 295; Davis v. Lane, 10 New. Hamp. 156; Blazer v. Bundy, 15 Ohio St. 57; Robinson v. Miller, 2 Bush (Ky.) 179; Wheat v. Kendall, 6 New. Hamp. 504. In Stallings v. Johnson, 27 Ga. 564, it was held that a promise by the principal to pay the debt at the end of a year was a good consideration for the promise of the creditor to wait a year, and discharged the surety.

[4] Per Read, J., McComb v. Kittridge, 14 Ohio, 348.

standing this reasoning seems invincible, the contrary has been repeatedly held, the ground upon which these decisions is founded being that the promise of the principal to pay interest for the extended period creates no additional obligation upon him, as he would have been obliged to pay the interest without any new agreement if the time had been given.[1] This, however, ignores the fact that if there is no new agreement, the debtor may at any time pay the debt and stop the interest.

§ 308. **Special instances of sufficient and insufficient consideration for extending time.**—A binding agreement by the principal to pay an increased and lawful rate of interest, is a sufficient consideration for an agreement to extend the time of payment of a note.[2] An agreement for extension made on Sunday, when the consideration is afterwards paid on a week day, is valid and discharges the surety. The court said: "When that payment was made by the one party and accepted by the other on terms perfectly understood by both, it constituted a perfect contract upon a valid consideration, free from any objection arising from the previous conversation on Sunday."[3] The surety in a debtor's relief bond is discharged if the obligee, for a valuable consideration, extend the time for the principal to make his disclosure beyond the six months prescribed in the bond. The time for the disclosure was continued at the request of the creditor, and it was held that the consent of the debtor to such continuance was a sufficient consideration for the agreement to continue.[4] A party sold another a mule, for the price of which the purchaser gave his note, with a surety. The seller warranted the mule to be sound, and when the note came due the purchaser claimed that the mule was unsound, and insisted upon returning it. The seller then agreed with the purchaser that if he would keep the mule the time of payment of the note should be extended to the next Christmas. Held, the agreement of the purchaser to keep the mule when he claimed the right to return it, was a sufficient consideration to support the agreement of the creditor to extend

[1] Reynolds *v.* Ward, 5 Wend. 501; Woolford *v.* Dow, 34 Ill. 424; Abel *v.* Alexander, 45 Ind. 523; overruling Pierce *v.* Goldsberry, 31 Ind. 52.

[2] Huff *v.* Cole, 45 Ind. 300. Upon this subject see, also, Halstead *v.* Brown, 17 Ind. 202.

[3] Uhler *v.* Applegate 26 Pa. St. 140, per Lewis, C. J.

[4] Phillips *v.* Rounds, 33 Me. 357. Upon the subject of what is a sufficient consideration for a giving of time, see Ducker *v*, Rapp, 67 New York, 464.

the time.[1] An unexecuted promise by a principal to confess judgment as collateral security for the debt, is not a sufficient consideration for an agreement to extend time.[2] A promise by the principal to pay the debt out of the proceeds of a particular judgment, or if that fails, then out of a particular note, is not a sufficient consideration for an extension of time, as it amounts to no more than telling the creditor where the principal expects to get the money with which to pay.[3] After a debt is due, an agreement made between the principal and creditor that the same shall be paid by instalments, at stated times in the future, even if one of such instalments is paid when due, is without sufficient consideration, and does not discharge the surety on the original obligation.[4]

§ 309. **When payment of usury sufficient consideration for extension of time—Agreement to pay usury not sufficient.**—The actual payment in advance of usurious interest by the principal to the creditor, is, where it cannot be recovered back, and has been sometimes held to be when it can be recovered back, a sufficient consideration for an agreement extending the time of payment of the debt.[5] The reason given for this in one case, was that even if the usurious agreement was void, no one but the party paying it could take advantage of it. The creditor who received the usury could not afterwards, on his own motion, repudiate the contract on which he received it.[6] In another case it was said that: "Between the parties to it * (the) contract (for extension) was like one between an adult and an infant, which though voidable by the minor party, is nevertheless binding on the other party."[7] In another case it was said that "Where both contracts are exe-

[1] Worthan v. Brewster, 30 Ga. 112.

[2] Hunt v. Knox, 34 Miss. 655.

[3] Wadlington v. Gary, 7 Smedes & Mar. (Miss.) 522; to same effect, see Grover v. Hoppock, 2 Dutcher (N. J.) 191.

[4] Van Rensselaer v. Kirkpatrick, 46 Barb. (N.Y.) 194.

[5] Scott v. Saffold, 37 Ga. 384; Montague v. Mitchell, 28 Ill. 481; Harbert v. Dumont, 3 Ind. 346; Kennedy v. Evans, 31 Ill. 258; Cross v. Wood, 30 Ind. 378; Grafton Bank v. Woodward, 5 New Hamp. 99; Austin v. Dorwin, 21 Vt. 38; Vilas v. Jones, 10 Paige Ch. R. 76; White v. Whitney, 51 Ind. 124; Wittmer v. Ellison, 72 Ill. 301; Cox v. The Mobile and Girard R. R. Co. 44 Ala. 611; Danforth v. Semple, 7 Chicago Legal News, 203; Myers v. First National Bank, 78 Ill. 257; Redman v. Deputy, 26 Ind. 338; Calvin v. Wiggam, 27 Ind. 489; Scott v. Harris, 76 Nor. Car. 205.

[6] Turrill v. Boynton, 23 Vt. 142.

[7] Kenningham v. Bedford, 1 B. Mon. (Ky.) 325, per Robertson, C. J.

cuted, the indulgence given and the consideration paid, it seems to me there is no ground left for the application of the rule belonging to the case of the executory agreement."[1] It is, however, well settled that a mere promise to pay usury, or giving a note for the same without an actual payment in advance of such usury, is not a sufficient consideration for an agreement to extend the time of payment, because such promise and note are utterly void.[2] And the actual payment of the usury promised, or for which the note was given, after the extended time has expired, will not make any difference in the rule, nor work the discharge of the surety.[3]

§ 310. **Cases holding payment of usury not sufficient consideration for extension.**—Where a statute declared "void all contracts infected with usury," it was held that the actual payment of usurious interest in advance was not a sufficient consideration to support a contract for extension. The court said: "The contract for usury is equally void, whether the money is actually paid or only promised to be paid at a future day. The statute has made no distinction. * Though the debtor parts with the money, it still belongs to him, and he may sue the next moment and recover it back. * If he agrees to give more (than legal interest) the agreement is void, and though the agreement be executed by paying the money, it is still void, and the money may be recalled at pleasure."[4] The same thing has been held, where the statute provided that any payment of usury should operate as a payment of so much on account of the principal, and the payment was made after the debt became due, and before the time of extension expired.[5] So, where the statute provided that

[1] Armistead *v.* Ward, 2 Patton, Jr. & Heath, (Va.) 504, per Thompson, J.

[2] Braman *v.* Howk, 1 Blackf. Ind. 392; Wilson *v.* Langford 5 Humph. (Tenn.) 320; Hunt *v.* Postlewait, 28 Iowa, 427; Galbraith *v.* Fullerton, 53 Ill. 126; Anderson *v.* Mannon, 7 B. Mon. (Ky.) 217; Silmeyer *v.* Schaffer, 60 Ill. 479; Cox *v.* Mobile & Girard R. R. Co. 37 Ala. 320; Roberts *v.* Stewart, 31 Miss. 664; Kyle *v.* Bostick, 10 Ala. 589; Tudor *v.* Goodloe, 1 B. Mon. (Ky.) 322; Gilder *v.* Jeter, 11 Ala. 256; Pyke's Admr. *v.* Clark, 3 B. Mon. (Ky.) 262; Payne *v.* Powell, 14 Texas, 600; Scott *v.* Hall, 6 B. Mon. (Ky.) 285; *contra*, Riley *v.* Gregg, 16 Wis. 666; Kelly *v* Gillespie, 12 Iowa, 55; Camp *v.* Howell, 37 Ga. 312; Corielle *v.* Allen, 13 Iowa, 289.

[3] Burgess *v.* Dewey, 33 Vt. 618; Smith *v.* Hyde, 36 Vt. 303; Hartman *v.* Danner, 74 Pa. St. 36.

[4] Vilas *v.* Jones, 1 New York, 274, per Bronson, J. To the same effect, see Meiswinkle *v.* Jung, 30 Wis. 361; see, also, Farmers & Traders Bank *v.* Harrison, 57 Mo. 503.

[5] Cornwell *v.* Holly, 5 Richardson Law (So. Car.) 47; Jenness *v.* Cutler,

where usurious interest was paid by the debtor, he might sue the creditor and recover it back, it was held that the actual payment of usury was not a sufficient consideration for extension. The court said: "Here the reception or reservation of usurious interest is an illegal act, and so far from being binding, it is inoperative, for the reason that it is expressly provided by statute that such interest may be recovered by the person, etc., who may have paid it, with damages."[1]

§ 311. **How far surety discharged by time given by one of several creditors—Surety who becomes such without knowledge of principal, discharged by giving of time.**—If one of two joint obligees makes such an arrangement with the principal for time as is sufficient to discharge the surety, the surety is entirely discharged, for the act of one of several joint obligees is the act of all.[2] But if two separate parties, who are not partners nor in any way connected, are equitable owners of an execution, and one of them consents to a stay of execution, and does such acts as will discharge the surety, that fact will not discharge the surety as to the part of the execution owned by the other party.[3] A surety who becomes such without the request of the principal, and after the principal has become bound, is at least as between himself and the creditor a surety, and is discharged by the giving of time to the principal.[4] The same thing was held where a surety became such without the knowledge of the principal. The court said, that although in such a case the principal was not bound to the surety, yet the surety was to all intents and purposes a surety, and entitled to subrogation upon payment of the debt, as the right to subrogation did not depend upon contract, but on the elementary principles of equity.[5] In such a case, where it was claimed that the addition of the name of the surety was an alteration of the note, which made it void, the court said the note was not void in any event, unless the principal chose to avoid it, and it was held that the surety was discharged by time given the principal.[6]

12 Kansas. 500. To similar effect, see Wiley v. Hight, 39 Mo. 130.

[1] Shaw v. Binkard, 10 Ind. 227, per Hanna, J. To same effect, see Goodhue v. Palmer, 13 Ind. 457.

[2] Clark v. Patton, 4 J. J. Marsh (Ky.) 33.

[3] Givens v. Briscoe, 3 J. J. Marsh (Ky.) 529.

[4] Talmage v. Burlingame, 9 Pa. St. 21.

[5] Peake v. Estate of Dorwin, 25 Vt. 28.

[6] Howard v. Clark, 36 Iowa, 114.

§ 312. **Surety discharged if time is given after debt is due—Other cases holding surety discharged by extension of time.**—If the agreement for extension is not made till after the debt is due, it will have the same effect to discharge the surety as if made before.[1] Giving time to the maker discharges the indorser of a note.[2] Granting an extension to the drawer of a bill of exchange, discharges the accommodation acceptor thereof, who is at the time known by the holder to be such.[3] The surety is not deprived of his rights as such by the fact that nineteen days after the maturity of the note for which he is bound, he gives a mortgage to secure the debt, which is stated in terms to be an additional security for the payment of the note.[4] Giving time to the principal in a forthcoming bond discharges the surety therein.[5] The surety in an arbitration bond is discharged if the time for making the award is extended beyond the time limited in the bond.[6] If a party having a claim against an estate give the administrator time for payment beyond that prescribed by law, the sureties on the administrator's bond are discharged from all liability for the payment of such debt.[7] Where a guardian made a surrender of his property, and his wards, in whose favor the bond was given, consented to and voted for a sale of the property on terms of credit, when credit could not have been given without such consent, it was held that such consent was a giving of time, and discharged the surety on the guardian's bond.[8] Where a promissory note was payable on demand, and the creditor, for a valuable consideration, agreed by parol to give time of payment to the principal for sixty days, it was held, the surety was discharged.[9] A rule and usage of a bank, which was well known to a surety, was to take all accommodation notes with all the parties as joint and several promisors, and regard all the promisors as principals, so far as the bank was concerned. A party signed a joint

[1] Turrill *v.* Boynton, 23 Vt. 142; Stowell *v.* Goodenow, 31 Me. 538; Carkin *v.* Savory, 14 Gray, 528; Veazie *v.* Carr, 3 Allen, 14.

[2] McGuire *v.* Woodbridge, 6 Robinsen (La.) 47; Veazie *v.* Carr, 3 Allen, 14.

[3] Davies *v.* Stainbank, 6 DeGex, Macn. & Gor. 679.

[4] Cumming *v.* Bank of Montreal, 15 Grant's Ch. R. 686.

[5] Steele *v.* Boyd, 6 Leigh (Va.) 547.

[6] Brookins *v.* Shumway, 18 Wis. 98.

[7] Pyke *v.* Searcy, 4 Porter (Ala.) 52; to a contrary effect, see Gillet *v.* Rachal, 9 Robinson (La.) 276.

[8] Brown *v.* Roberts, 14 La. An. 256.

[9] Grafton Bank *v.* Woodward, 5 New Hamp. 99.

and several note to the bank, being, in fact, a surety, and known to be such by the bank, but the fact of suretyship did not appear from the note. Held, he was discharged by an extension of time given the principal. The court said, that as long as the creditor did nothing to change the contract, the surety was bound as principal. "Allowing the bank to deal with sureties on the note as principals, and to treat them accordingly, confers the power to do so in that contract to the fullest extent, but gives no right to make them parties to another contract which increases their liability. Such construction would admit the bank to hold sureties perpetually liable, and at the same time deprive them of the right to pay the debt and resort to their principal."[1]

§ 313. **Miscellaneous cases holding surety discharged by extension of time.**—A composition deed by which the creditor agrees to receive a certain per cent. of all debts due from the makers of a note, in full discharge of the same, to be paid at a time beyond the maturity of the note, operates as an extension of the time of payment, and discharges the surety.[2] Extending the time of payment of a note by an agreement written on a separate piece of paper, discharges the surety on the note.[3] Principal and sureties executed a bond, conditioned that the principal should collect debts due the obligee, and account faithfully for his transactions as often as required, and at least on the first day of September of each year. The principal collected money, for which he rendered an account to the obligee, who thereupon gave the principal time, upon his executing a trust deed of his property to secure the amount collected: Held, the sureties were discharged. The court said it made no difference that the principal might collect further sums under his agency, and proceeded: "An action for any sum of money, actually collected, accrues as soon as it is collected; and if that action be suspended, such suspension appears to the court to release the sureties with respect to the sum so suspended as completely as they would be released from the whole bond if the whole money had been collected."[4] Where

[1] Lime Rock Bank *v.* Mallett, 42 Me. 349, per Tenney, C. J.

[2] Perry *v.* Armstrong, 39 New Hamp. 583.

[3] Dunham *v.* Countryman, 66 Barb. (N. Y.) 268.

[4] Hopkirk *v.* M'Conico, 1 Brockenbrough, 220, per Marshall, C. J. Holding that surety in sealed bond is discharged at law by time given before breach, but not after breach, see United States *v.* Howell, 4 Washington, 620. See, also, on this point, Hayes *v.* Wells, 34 Md. 512.

after judgment against principal and surety, the creditor agreed to take, within a certain time, land from the principal for part of the debt, it was held that the surety was discharged. If the surety had paid the debt within that time, he could only have received payment from his principal in land instead of money, and his rights could not be thus changed, and he held liable.[1] Where the holder of a bill of exchange agreed with the acceptor that he would not look to the acceptor for payment till he had exhausted, without success, the legal remedies against the indorser, it was held the indorser was discharged.[2] Certain debtors agreed to pay their indebtedness in two, four, six and eight months from the date of their agreement, and a surety became responsible that they would do so. About three weeks after the date of this agreement, one of the creditors took for the debt, from the principals, certificates of deposit, dated the day they were given, and payable in two, four, six and eight months: Held, this was a giving of time, and discharged the surety.[3] A creditor, in renewal of the notes of a firm which he held, and which were secured by the bond of a surety, took the individual notes of a member of the firm, payable at a future time, signed in this wise: "For the late firm of Pease, Chester & Co. Wm. J. Pease:" Held, that though time might not thereby be given to all the members of the firm, it was given to the maker of the renewal notes, and the surety was discharged.[4]

§ 314. **Suspending fine by governor of state does not release surety—Other cases holding surety not discharged by extension of time.**—A party was fined $500, and replevied (stayed) the judgment with surety. The Governor of the State respited the payment of $250 of the fine for six months. Held, the surety was not discharged. The court said the Governor had the constitutional right to grant the respite. The surety knew this when he became such "and must be held to have agreed that its exercise should not impair or destroy his obligation to pay the debt." This power of the Governor cannot be embarrassed or clogged by the danger of ultimate loss of the amount of the fine arising from the release of the person who may have replevied it. A distinction is made between the case of the state and a private

[1] Bangs v. Strong, 7 Hill (N.Y.) 250.

[2] Ige v. Bank of Mobile, 8 Port. (Ala.) 108.

[3] Gross v. Parrott, 16 Cal. 143.

[4] Farmers & Mechanics' Bank v. Kreheval, 2 Mich. 504.

individual.[1] If the creditor notify the principal that if he does not pay before a certain time, suit will be commenced against him, this is not such an agreement to give time as discharges the surety.[2] The holder of a note received from the principal two four-months bills, accepted by the principal, the aggregate of which equaled the amount of the note, with the understanding that if the bills were paid they should discharge the note, but the note was not to be canceled nor any part of its "obligation surrendered until these acceptances were taken up." One of the bills was sold and the amount credited on the note, but not being paid the credit was scratched off. Held, the surety was not discharged, as the creditor might at any time have sued the note.[3] A statute provided that "a surety against whom a judgment may be rendered may obtain judgment against his principal immediately for the amount for which he has been made so liable." Judgment was recovered against a principal and surety, and the creditor stayed execution for six months. Held, the surety was not discharged, because his remedy against the principal was not suspended.[4] Where a creditor before judgment agreed that the principal should have the privilege at any time within sixty days after judgment of paying the debt in books, it was held the surety was not discharged. The court said there was no mutuality in the agreement. The principal might deliver the books, but was not bound to do so. The creditor had a right to proceed at any time on the judgment.[5] Three notes were made by principal and surety. After two of them became due, and before the maturity of the third, the principal gave the creditor an agreement to pay him two per cent. interest on all the notes after they became due. Held, this alone did not amount to an agreement to give time nor discharge the surety.[6]

§ 315. **Miscellaneous cases, holding surety not discharged by extension of time.**—Where a surety became bound that his principal would account for all money received by him for the obligee, and the principal collected money and rendered an account to the obligee which was false, and less than the amount collected, and the obligee gave the principal time upon the amount reported due,

[1] Nall *v.* Springfield, 9 Bush (Ky.) 673, per Lindsay, J.

[2] McGuire *v.* Bry, 3 Robinson (La.) 196.

[3] Weller *v.* Ranson, 34 Mo. 362.

[4] Peay *v.* Poston, 10 Yerg. (Tenn.) 111.

[5] Woolworth *v.* Brinker, 11 Ohio St. 593.

[6] Claiborne *v.* Birge, 42 Texas, 98.

it was held, the surety was discharged from liability for the amount reported due, but not from liability for the amount concealed.[1] It has been held that a contract with an intermediate holder of a note to give time to the principal does not discharge the surety as against a subsequent *bona fide* holder, even where the note is over due when the time is given and the subsequent holder takes it.[2] It has been held that the drawer of a check is not a surety for the payee, though it be lent to, or drawn for, the accommodation of the payee, and the drawer is not discharged by an extension of time given to the payee.[3] Where A and B were partners and dissolved their partnership, and A agreed to pay the firm debts, which facts were known to the creditor, and the creditor afterwards granted A an extension of time, it was held that B was not discharged thereby.[4] A guaranty provided as follows: "B informs me, that in conversation with Mr. S. of your firm, he stated to B if he would get me to be responsible for him to you, or, in other words, to give B a letter of credit to you, he would sell him on longer time—say nine months or a year," and then went on to guaranty $1,000. Separate parcels of goods were purchased from time to time, and for each parcel B's note at six months was taken. Held, the taking of the notes was not a waiver of the right to resort to the guarantor, and it was not a condition of the guaranty that at least nine months credit should be given to B.[5] Where upon the back of a note payable on demand, there was indorsed by consent of all parties, the following: "This note is to be paid off within three years from date," and the holder did not compel payment of the note within three years, it was held the surety was not discharged, as the indorsement only amounted to a promise by the principal to pay the money within three years.[6] Judgment was rendered against principal and sureties in a replevin bond, in consequence of a compromise with the principal, and on an agreement to give four months time for the payment of the judgment. The exten-

[1] Hopkirk *v.* M'Conico, 1 Brockenbrough, 220.

[2] Devore *v.* Mundy, 4 Strobhart Law (So. Car.) 15.

[3] Murray *v.* Judah, 6 Cowen, 484.

[4] Swire *v.* Redman, Law Rep. 1 Queen's Bench, Div. 536. To same effect, see Maingay *v.* Lewis, Irish Rep. 3 Com. Law, 495; which last case is overruled—Maingay *v.* Lewis, Irish Rep. 5 Com. Law, 229.

[5] Lawton *v.* Maner, 10 Richardson Law (So. Car) 323.

[6] Lawrence *v.* Walmsley, 12 J. Scott (N. S.) 799.

sion of time was not a part of the judgment, but was evidenced by a paper afterwards executed. The attorney for the principal told the creditor at the time the agreement for extension was executed, that the sureties consented to the same, and there was no consideration paid for the extension. Held, there was no valid agreement for extension, and the sureties were not discharged.[1]

§ 316. **If creditor take principal's note for extended period, it enlarges the time and discharges the surety.**—When the principal and surety are bound to the creditor by a note or other negotiable instrument, if the creditor take from the principal a new note[2] or bill of exchange[3] for the debt, falling due after the period when the original obligation matures, this generally amounts to an extension of time and discharges the surety. It has been said that: "The rule is too well settled to justify the citation of authorities to support it, that the giving of a valid obligation, payable in the future, operates to suspend all right of action on the consideration for which it is given until the expiration of the time fixed for the payment of the obligation, and this, although the obligation is not itself payment."[4] Again, it has been said that: "A creditor who, in receiving a new note, surrenders the first, novates his debt; the sureties it had for the payment of the first are discharged."[5] Where the principal gave his creditor a note for the debt, due one day after date, the surety was thereby discharged. The Court said that taking a note for a debt was not payment thereof, unless expressly so agreed, "But if the creditor takes the bill or note of his debtor, payable at a future day, it is an extension of credit, and he cannot legally commence and sustain a suit for the original indebtedness until

[1] Tousey *v.* Bishop, 22 Iowa, 178. Holding surety not discharged by agreement to give time under special circumstances, see Agee *v.* Steele, 8 Ala. 948; Jones *v.* Brown, 11 Ohio St. 601. Holding, that surety who pleads that time has been given the principal need not allege that it was without his consent, see Maingay *v.* Lewis, Irish Rep. 5 Com. Law, 229. Holding the precise opposite, see Stone *v.* State Bank, 8 Ark. (3 Eng.) 141.

[2] Hart *v.* Hudson, 6 Duer (N. Y.) 294; Kelty *v.* Jenkins, 1 Hilton (N. Y.) 73; Simmons *v.* Guise, 46 Ga. 473.

[3] Maingay *v.* Lewis, Irish Rep. 5 Com. Law, 229; Bellingham *v.* Freer, 1 Moore's Priv. Con. Cas. 333. Holding that taking a note for extended period does not *ipso facto* amount to a giving of time, see Shaw *v.* The First Associated Reformed Presbyterian Church, 39 Pa. St. 226.

[4] Chickasaw County *v.* Pitcher, 36 Iowa, 593, per Cole, J.

[5] Morgan et al. *v.* Their Creditors, 1 La. (Miller) 527, per Martin, J.

such bill or note becomes due and payable. * Taking a note from a debtor for a debt due on a simple contract, though it does not merge the contract, and a suit may generally be brought upon the original consideration by producing and delivering up the note at the trial, has always been considered a valid agreement between the parties, and a suspension of the day of payment until the note becomes due."[1] Where principal and sureties were liable on a note, and the creditor agreed to extend the time of payment and take a less sum, and took the note of the principal for such less sum for an extended period, but upon the stipulation that if the last note was not paid, the original note should remain valid and binding, it was held that the sureties were discharged.[2] The holder of an over due non-negotiable note, on which there was a surety, accepted from the principal four new negotiable notes, three of which were payable at a future day, and the other on demand after date, and agreed that the original note should remain in his hands as collateral security for the payment of the new ones. Held, the effect of this arrangement was to enlarge the time of payment for a part of the debt, and to change the character and terms of the contract with respect to the whole of it, and that the surety was thereby discharged.[3] Where, after a note with sureties became due, the creditor received payment of a part of it, and took the negotiable note of the principal at sixty days for the remainder, and indorsed on the back of the original note, that when the sixty days' note was paid, it should be a full payment of such original note, it was held the surety was discharged.[4] After the maturity of a note, the principal executed a new note due at an extended period, which was indorsed by the creditor and discounted, and the avails paid to the creditor, and the original note was retained by him. The principal paid $100 on the last note, and another note was made by the principal for an extended time, and when it was due, the principal paid $200 on it. Held, the surety was discharged. The court said the facts constituted an implied agreement for an extension of time, and the receipt of the money on the new note was a sufficient consideration for it. The fact that the original note was not surren-

[1] Fellows v. Prentiss, 3 Denio, 512.

[2] Robinson v. Offutt, 7 T. B. Mon. (Ky.) 540.

[3] Andrews v. Marrett, 58 Me. 539.

[4] Morton v. Roberts, 4 T. B. Mon. (Ky.) 491.

dered made no difference, as the new notes were not taken as collateral merely.[1] An auctioneer having sold goods, and paid over only a small portion of the proceeds, gave his notes due at different times for the balance. Held, his sureties were discharged. The court said: "In this case the debt was divided, and several portions of it thrown into the form of a negotiable instrument. From these facts, what but an agreement to wait until their maturity can be implied?"[2] When a debt became due, the creditor told the principal he would wait if the principal would pay twelve per cent. interest, but no definite time of extension was in terms agreed upon. A note for one year's interest at that rate was given by the principal to the creditor, which was paid, and another note for interest given. Held, the surety was discharged. The court said: "There is no substantial difference between taking notes for the interest only, and notes for the principal, for it is the effect of the one as clearly as of the other, to show an express understanding, that the period for paying the debt itself was prolonged, else for what was the twelve per cent. paid?"[3]

§ 317. **Surety on bond and for open account discharged by creditor taking principal's note check or trust deed for extended time.**—If the debt for which the surety is bound is evidenced by a bond or other sealed instrument, and the creditor take from the principal, for the debt, a note, bill or other negotiable instrument which falls due after the original obligation matures, this usually amounts to an extension of time, and discharges the surety.[4] In a leading case in which this was held, the court said: "The obligee thinks fit totally to change the nature of the security and the credit, * and doing this, he does this material injury to the surety: he has a right the day after the bond is due, to come here (into chancery) and insist upon its being put into suit; the obligee has suspended that, till the time contained in the notes runs out; therefore, he has disabled himself to do that equity to the surety which he has a right to demand." The court will not inquire whether the surety is benefited or not. "You cannot

[1] Hubbard v. Gurney, 64 New York, 457.

[2] Mouton v. Noble, 1 La. An. 192, per Eustis, C. J.

[3] Darling v. McLean, 20 Up. Can. Q. B. R. 372, per Robinson, C. J.

[4] Armestead v. Ward, 2 Patten, Jr. & Heath (Va.) 504; Clarke v. Henty, 3 Younge & Coll. (Exch.) 187; Hooker v. Gamble, 12 Up. Can. C. P. R. 512; Smith v. Crease's Exrs. 2 Cranch C. C. 481; Hooker v. Gamble, 9 Up. Can. C. P. R. 434; Bangs v. Mosher, 23 Barb. (N. Y.) 478.

keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence, contrary to the nature of his engagement."[1] Extending the time of payment of an open account by taking the note of the principal for it, discharges the surety.[2] Certain parties executed a bond by which they became sureties for three months from the date of the sales respectively for any bills of goods which might be sold the principal. A sale was made and the creditor took the negotiable note of the principal for the amount, which, allowing days of grace, became due one day after the three months' credit expired, and it was held the sureties were thereby discharged.[3] Principal and sureties executed a bond conditioned that the principal would pay for all sewing machines furnished him by the plaintiff when the price was due, or within thirty days after notice of default in such payment. When the amount was due, the plaintiff took the principal's note therefor, due in three months, and it did not appear that the same was taken as collateral security. Held, this was a giving of time which discharged the sureties on the bond.[4] If after the debt is due the creditor accept from the principal his check for the amount, due in fifteen days, this amounts to an extension of time and discharges the surety.[5] So, where after the debt was due, the creditor received the check of the principal for the amount, dated ahead, and, at its maturity presented it for payment, it was held the surety was discharged.[6] So, also, where such a check was accepted by the creditor to be in full satisfaction of the debt, if paid, it was held the surety was discharged.[7] After a note, on which principal and surety were liable, fell due the principal executed a deed of trust to the creditor, with authority to the trustee to sell the property conveyed for the satisfaction of the debt, after six months. There was no express agreement

[1] Rees v. Berrington, 2 Vesey Jr. 540, per the Lord Chancellor.

[2] Lee v. Sewall, 2 La. An. 940; Myers v. Welles, 5 Hill (N. Y.) 463; Howell v. Jones, 1 Comp. Mees. & Ros. 97; *Id.* 4 Tyrwh. 548.

[3] Appleton v. Parker, 15 Gray, 173.

[4] Weed Sewing Machine Co. v. Oberreich, 38 Wis. 325.

[5] Albany City Fire Ins. Co. v. Devendorf, 43 Barb. (N. Y.) 444.

[6] Place v. McIvain, 38 New York, 96.

[7] Okie v. Spencer, 1 Miles, (Pa.) 299. Holding that the creditor who receives a check from the principal who has no money in bank, but promises to deposit sufficient to meet it in two or three days, does not thereby discharge the surety, see Bordelon v. Weymouth, 14 La. An. 93.

for delay, but the Court held that such an agreement was necessarily implied, and the surety was thereby discharged.[1] After the maturity of a note on which principal and surety were liable, the principal gave the creditor a trust deed upon land to secure the note, and in the trust deed provided that no sale of the land should be made for eighteen months, and if, within that period the note was paid, the trust deed should be null and void. This trust deed was accepted by the creditor, and the court held that the time of payment was extended, and the surety discharged.[2]

§ 318. **When surety not discharged if creditor take principal's note for extended period.**—Where the surety in a bond claimed to be discharged because a note at two months was taken from the principal by the creditor, it was held that it was competent to prove by parol that it was orally agreed between the creditor and principal that taking the note should not suspend the remedy on the bond.[3] Principal and surety were liable on a bond, and the creditor accepted from the principal his promissory notes, falling due at a time subsequent to the maturity of the bond, but at the same time clearly expressed his intention of holding the surety on the bond, and there was no express agreement that the notes should be received as payment of the bond. Held, the surety on the bond was not discharged. The notes were simply collateral to the bond, and taking them did not suspend the remedy on it, as it was clearly the intention of the parties that such remedy should not be suspended.[4] Where the principal after the debt became due gave the creditor a note for the amount at ten days from date, but ante-dated it so that it matured by its terms before the original debt was due, it was held there was no extension and the surety was not discharged.[5] A held an overdue note of B, indorsed by C, and D guarantied

[1] Lea v. Dozier, 10 Humph. (Tenn.) 447.

[2] Smarr v. Schnitter, 38 Mo. 478. To contrary effect, see Headlee, Admr. v. Jones, 43 Mo. 235. Holding that giving time to the principal in consideration of a deed of trust on personal property given by the principal to the creditor, discharges the surety, see Smith v. Clopton, 48 Miss. 66. See, also, Semple v. Atkinson, 64 Mo. 504.

[3] Wyke v. Rogers, 1 De Gex. Macn. & Gor. 408.

[4] Paine v. Voorhees, 26 Wis. 522. For case holding under peculiar circumstances that notes for extended time were collateral and did not discharge the surety, see Fox v. Parker, 44 Barb. (N. Y.) 541.

[5] Robinson v. Dale, 38 Wis. 330.

its payment within sixty days after the date of the guaranty. Held, there was no presumption of law that the guaranty was taken for the benefit of B, or that it extended to him the time of payment. It was an independent contract, which did not suspend the right of action of A against B, and there being no express agreement for extension, C was not discharged.[1] A principal and two sureties were liable on a note, and it was agreed that the principal might have further time by giving a new note with the same sureties. Such new note was given, which was signed by only one of the sureties. In an action on the new note, judgment by default was rendered against the principal, but it was held not obligatory on either of the sureties. Held, the sureties were liable on the old note. Having defeated a recovery on the new note, they were estopped to set it up as an extension of time.[2] A guaranty was as follows: "If * (A) purchases a case of tobacco on credit, I agree to see the same paid for in four months." A purchased the tobacco and gave his note at four months for it. Held, giving the note did not discharge the guarantor.[3] So where a party guarantied the payment of a bill of goods already bought, for which the principal had given his note, and guarantied the payment for such other bills as the principal might buy, and the principal bought other bills and gave his notes for them, but none of the notes were negotiated, it was held the giving of such notes was not a payment by the principal which would discharge the guarantor.[4]

§ 319. **Surety not discharged by creditor taking collateral security for extended time.**—The mere fact that the creditor takes a collateral security for the debt which matures after the time the debt for which the surety is liable comes due, will not discharge the surety if it does not amount to an extension of the time of payment.[5] If when the collateral security is given there is an ex-

[1] Williams *v.* Covillaud, 10 Cal. 419.

[2] Williams *v.* Martin, 2 Duvall (Ky.) 491.

[3] Case *v.* Howard, 41 Iowa, 479.

[4] Willey *v.* Thompson, 9 Met. (Mass.) 329. For a questionable decision, holding that if a legatee takes the note of an executor due one day after date, he does not discharge the executor's surety, see Cooper *v.* Fisher, 7 J. J. Marsh (Ky.) 396.

[5] Sigourney *v.* Wetherell, 6 Met. (Mass.) 553; Shubrick's Exrs. *v.* Russell, 1 Desaussure (So. Car.) 315. Holding that the taking of a collateral security does not bar a suit on the principal debt, see Mendenhall *v.* Lenwell, 5 Blackf. (Ind.) 125; Dugan *v.* Sprague, 2 Ind. 600; Mills *v.* Gould, 14 Ind. 278.

press agreement, either that the time of payment of the debt shall or shall not be extended thereby, such agreement will prevail. If there is no express agreement, it has been held that no agreement to delay the collection of an overdue debt is implied from the receipt by the creditor from the principal of a note or other obligation not yet due, merely as collateral security therefor. In holding this to be the law, the following distinctions were drawn: "There is a class of securities payable on time, the taking of which, on an antecedent debt, implies an agreement for the suspension of the antecedent debt, but that class of cases is confined to those where the creditor accepts the note or bill foı and on account of the antecedent debt, and the new security, for the time being, at least, is to take the place of and represent the original debt. That class is distinguishable from, and not to be confounded with, the class where the creditor has accepted simply a new additional or collateral security for an antecedent debt. In the former transaction an agreement to give time may be implied, but not out of the latter transaction."[1] Where principal and surety were liable on a bond, and the creditor took from the principal a new bond for the same amount, due at a later period than the first, and drawing a larger interest, but with the express understanding that the new bond should be held as collateral security, and that the first bond should remain in force, it was held that the surety was not discharged.[2] After the note upon which a surety was liable, came due, the principal gave the creditor a bill of exchange, due in a year, as collateral security, and the creditor gave him a receipt which stated that the amount of the bill, when collected, should be applied on the note. Held, these facts did not discharge the surety. It was insisted that there was an implied promise to indulge the makers of the note till the maturity of the bill. But (the court said) we think this inference is entirely answered by the other facts in the ver-

[1] Austin v. Curtis, 31 Vt. 64, per Bennett, J.; overruling, Michigan State Bank v. Estate of Leavenworth, 28 Vt. 209. Holding that a giving of time will be presumed from taking collateral security, see Hill v. Bostick, 10 Yerg. (Tenn.) 410.

[2] Remsen v. Graves, 41 New York, 471. Holding that where a new note of the principal with new sureties for extended time, is taken by the creditor as collateral to old note, without any agreement to give time, the surety on the old note is not discharged, see Globe Mutual Ins. Co. v. Carson, 31 Mo. 218. See, also, Newcomb v. Blakely, 1 Mo. Appl. R. 289.

dict, for it is found also by the jury that the bill was taken as collateral security merely, which shows that the agreement to apply its proceeds to the payment of the note, was not understood by the parties, as giving the debtor any claim to indulgence.[1] A party gave another a letter of credit, upon which goods were sold. The creditor took up a note given by the purchaser for the price, and accepted a note signed by the purchaser, and another due at a time in the future. The time when this last note became due, was not beyond the time for which the guarantor had become liable. It was held, that taking the new note did not discharge the guarantor.[2] A note of a bank provided that the bond of the cashier should be renewed every year, but that the renewal or giving a new bond should not affect the old one, unless it was actually surrendered to be canceled. A renewal bond with different sureties was given, but the old one was not surrendered to be canceled, and it was held that the sureties in the old bond were not thereby discharged.[3]

§ 320.—**When surety not discharged if creditor take from principal mortgage for extended time as collateral security for the debt.**—It has been repeatedly held that the mere fact that the creditor takes from the principal a mortgage or trust deed of property as collateral securety for the debt for which the surety is liable, which matures after the maturity of such debt, does not of itself, in the absence of an agreement to that effect, extend the time or discharge the surety.[4] Thus, where a judgment was recovered against a principal, and the creditor then took from the principal a deed of trust on real estate, which stipulated that, if the principal should not pay the judgment within a year, the trustee should sell the real estate for the satisfaction of the debt, it was held that no time was thereby given on the judgment, and the surety was not discharged.[5] The acceptance by a creditor of a bond and mortgage, payable at a future day, as collateral security for the amount of an execution in the hands of the sheriff, is

[1] Wade *v.* Staunton, 5 Howard (Miss.) 631, per Trotter, J.

[2] Norton *v.* Eastman, 4 Greenl. (Me.) 521.

[3] Pendleton *v.* Bank of Kentucky, 1 T. B. Mon. (Ky.) 171. Holding sureties not discharged by creditor taking collateral security for extended time, see Frickee *v.* Donner, 35 Mich. 151; Adams *v.* Logan, 27 Gratt. (Va.) 201.

[4] Burke *v.* Cruger, 8 Texas, 66; Williams *v.* Townsend, 1 Bosworth (N. Y.) 411.

[5] Pendexter *v.* Vernon, 9 Humph. (Tenn.) 84.

not *ipso facto* a stay of the execution.[1] After the maturity of a note, upon which principal and surety were liable, the principal executed and delivered to the creditor as collateral securety a mortgage of real estate, to secure a larger sum than the note, in which the amount of the note was included. The mortgage contained a covenant on the part of the mortgagor to pay the money on a day therein named, but no provision that the right of action on the note should be suspended. Held, the remedy on the note was not suspended, and the surety was not discharged.[2] A creditor took from the principal a mortgage, conditioned that he would make a reconveyance if the debt for which a surety was liable, and other debts, were paid within five years. There was no express agreement to wait five years, nor any other time, and it was held, the surety was not discharged.[3] Principal and surety were liable on several notes, maturing at different times, and the principal executed a trust deed of land to secure the payment of the notes, which provided that, in case of default for thirty days in the payment of any of the notes, they should all become due, and the trustee might sell the property and pay all the notes, whether due or not. Held, the surety was not thereby discharged.[4] Where principal and surety were liable on a note, and the principal assigned to the creditor all his household goods, etc., as a further security for the debt, with the proviso that he should not be deprived of the possession of the property assigned until after three days' notice, it was held that no time was given and the surety was not discharged.[5] When the creditor takes from the principal a mortgage for an extended time, as security for the debt, the surety may prove by parol, an agreement for delay between the principal and creditor, prior to the making of the mortgage.[6] The mere fact that after a surety has become liable, the creditor takes a trust deed or other security for the debt, where there is no extension of time, will not affect the liability of the surety.[7]

§ 321. **When surety not discharged by extension for less period than that in which judgment could be recovered—Injunction**

[1] Bank of Pennsylvania v. Potius, 10 Watts (Pa.) 148.

[2] Brengle v. Bushey, 40 Md. 141.

[3] Thurston v. James, 6 Rhode Is. 103.

[4] Morgan v. Martien, 32 Mo. 438.

[5] Twopenny v. Young, 3 Barn. & Cress. 208.

[6] Morse v. Huntington, 40 Vt. 488.

[7] Scanland v. Settle, Meigs (Tenn.) 169; Oxley v. Storer, 54 Ill. 159.

obtained by principal.—If the time of payment is extended for a definite time, but the extension expires before judgment could have been obtained against the principal, it has been held, under certain peculiar circumstances, that the surety was not thereby discharged. Thus, where the principal died, and the creditor made a binding agreement with his administrator not to sue for four months, where by statute he could not have sued till a year after the death of the principal, it was held the surety was not discharged.[1] So it has been held that a surety is not discharged by the creditor taking from the principal a cognovit in an action he had brought against the principal, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course, because by the arrangement time was not given, but the remedy was accelerated.[2] Suit having been brought against the principal in a note, and the action being soon for trial, the creditor took a cognovit from the principal for the debt, payable in three instalments—the first on April 28th, the others in May and June; but if the principal failed in any of these payments, the creditor was to be at liberty to immediately enter up judgment, and issue execution for the whole sum. The first instalment was not paid. If the creditor had proceeded in his action he could not have obtained judgment before April 28th: Held, no time was given, and the surety was not discharged.[3] A judgment was recovered against a party in the court below, from which he prosecuted a writ of error to the Supreme Court, giving a surety on the writ of error bond. The judgment was affirmed, and, by virtue of a statute allowing it, judgment was rendered by the Supreme Court against the principal and surety. The principal then got an injunction against proceedings being had under the judgment, to which latter proceeding the surety was not a party: Held, the surety was not thereby discharged.[4]

§ 322. **If creditor continue case against principal, surety discharged—Other cases holding surety discharged by extension of time.**—Suit having been brought on a note against a principal

[1] Gardner *v.* Van Nostrand, 13 Wis. 543.

[2] Hulme *v.* Coles, 2 Simons, 12; Barker *v.* McClure, 2 Blackf. (Ind.) 14; Suydam *v.* Vance, 2 McLean, 99; Fletcher *v.* Gamble, 3 Ala. 335.

[3] Price *v.* Edmunds, 10 Barn. & Cress. 578; *Id.* 5 Man. & Ryl. 287.

[4] Hodges *v.* Gewin, 6 Ala. 478.

and surety, the creditor by a binding contract agreed to continue the case one term, and did so. Held, this was a giving of time which discharged the surety.[1] The obligee in a bond having placed himself in such a position with regard to the principal, that he could not demand payment of the bond until a certain agreement entered into with third parties had been carried into effect, it was held that this was such a giving of time as discharged the surety in the bond[2] A creditor who holds a guaranty to secure a floating balance, cannot, without the surety's consent, give time to the principal for a portion of the debt, and yet hold the surety liable for that portion.[3] But a contract of suretyship for the performance by the vendee of a continuing agreement of purchase and sale, by which goods purchased from time to time, as required, are to be paid for at stated periods, is not discharged by mere forbearance on the part of the vendor to enforce payment, as provided by the contract; without a binding agreement for extension of time.[4] A contract provided that a principal should take from a gas company tar, etc., and pay for each month's supply within the first fourteen days of the ensuing month, after account rendered, "unless the company should, by writing signed by their secretary, allow a longer time for payment." More than fourteen days elapsed after a monthly bill was rendered, and it was not paid, and the secretary of the gas company afterwards accepted the note of the principal at thirty days for the amount. Held, that assuming this to be a giving of time, by "writing signed by the secretary," within the meaning of the contract, as such time was given after the breach of the contract, the surety thereon was discharged from liability from the bill for that month, but not for subsequent months.[5] Where a surety is liable for rent payable quarterly, and time is given as to one or more instalments, the surety is discharged as to these only, and not from such as to which no time is given, even though they are all secured by one lease, and relate to the same premises.[6]

[1] Wybrants *v.* Lutch, 24 Texas, 309. To similar effect, see Phillips *v.* Rounds, 33 Me. 357.

[2] Cross *v.* Sprigg, 2 Macn. & Gor. 113; *Id.* 2 Hall & Twells, 223.

[3] Davies *v.* Stainbank, 6 DeGex, Macn. & Gor. 679.

[4] McKecknie *v.* Ward, 58 New York, 541.

[5] Croydon Gas Co. *v.* Dickinson, Law Rep. 2 Com. Pl. Div. 46; reversing Croydon Gas Co. *v.* Dickinson, Law Rep. 1 Com. Pl. Div. 707.

[6] Ducker *v.* Rapp, 67 New York, 464.

§ 323. **Agreement for extension must be made by party having authority—Conditional agreement for extension.**—An agreement for an extension of time, in order to be valid and work the discharge of the surety, must be made on behalf of the creditor by some one having authority to bind him. The holder of a note indorsed in blank is *prima facie* presumed to be the owner thereof, but this presumption is rebutted if he declares he is not the owner.[1] It has been held that the attorney of a plaintiff in a suit has no power, without express authority, to suspend an execution issued in the suit in which he is attorney.[2] It has also been held that such attorney has no power to bind his client by an agreement, before judgment, that judgment shall be stayed a given time, where such stay is not incorporated in the judgment.[3] But it has been held that an attorney, appointed by a creditor to attend the examination of a poor debtor, has authority to make an agreement continuing the case, and in consequence a surety was discharged.[4] Where the board of police of a county consented that time might be given a principal upon his executing a new note, and paying interest and costs, and the president of the board agreed to give the principal time, without any new note being given, it was held the sureties were not discharged, as the president had no right to grant the extension except upon a new note being given, and this had not been done.[5] An auctioneer, being in arrear for auction dues coming to the state, the state treasurer gave him time by express agreement. Held, he had no authority to do so, and the sureties of the auctioneer were not discharged.[6] Where an intestate was surety on a note, it was held that the administrator of such intestate had power to consent to an extension of time to the principal, if such extension was for the interest of the estate.[7] A conditional agreement by the creditor to give time to the principal, will not usually discharge the surety, unless the condition is complied with, for otherwise there is no completed and binding contract for extension.[8] Principal and sureties signed a bond, conditioned that the principal

[1] Farwell *v.* Meyer, 35 Ill. 40.

[2] Union Bank *v.* Govan, 10 Sm. & Mar. (Miss.) 333.

[3] Seawell *v.* Cohn, 2 Nevada, 308.

[4] Phillips *v.* Rounds, 33 Me. 357.

[5] Board of Police of Clark Co. *v.* Covington, 26 Miss. 470.

[6] State *v.* Beard, 11 Robinson (La.) 243.

[7] Smarr *v.* McMaster, 35 Mo. 349.

[8] Wheeler *v.* Washburn, 24 Vt. 293; Harnsberger's Exr. *v.* Geiger's Admr. 3 Gratt. (Va.) 144.

would complete a house within a certain time. Afterwards an agreement was written on the back of the bond, which it was intended should be signed by all the parties, and which, by its terms, extended the time for the completion of the building. One of the sureties did not sign this agreement. Held, the contract for extension was not complete nor binding; no time was given, and the sureties were not discharged.[1]

§ 324. **How surety of collector of taxes affected by extension of time—Other cases.**—The rule with reference to the discharge of a surety by extension of time, has been variously applied by the courts to the case of sureties for collectors of public money. It has been held that a special act of the legislature giving time to a particular tax collector to collect and account for taxes, operates the release of his sureties.[2] The condition of a collector's bond was that he should pay over to the state the money received by him "at such time as the law shall direct." After the bond was made the legislature appointed a more distant day for the payment of the tax by the collector than the one provided by law when the bond was made. Held, the sureties were not discharged, because the bond by its reasonable construction held them liable after the change, and besides, the state was under no obligation to keep the law the same as it was when the sureties became bound and might change it at its pleasure without discharging the sureties.[3] Where, after a bond had been signed by a collector of taxes and his sureties, there were several extensions, by joint resolutions and acts of the general assembly, of the time in which collectors should make their settlements with county treasurers, it was held that the sureties were not discharged. The court said the contract of the sureties had not been in any manner changed. Laws requiring that settlements shall be made at stated times are merely directory to the officers of the government, and form no part of the contract with the sureties, and the change of such laws in no way affects the rights of the sureties. Besides "the indulgence granted to the officer by the extension of time in this case, is not a contract, but is an

[1] Barber v. Burrows, 51 Cal. 404.

[2] Johnson v. Hacker, 8 Heisk. (Tenn.) 388; Davis v. The People, 1 Gilman (Ill.) 409; People v. McHatton, 2 Gilman (Ill.) 638. If the resolution extending time is void for want of authority in the county commissioners to pass it, the collector's sureties are not discharged thereby. Coman v. The State, 4 Blackf. (Ind.) 241.

[3] State v. Carleton, 1 Gill (Md.) 249.

ordinary act of legislation for the public good, with no consideration for the extension moving from the officer, and is repealable at the will of the general assembly."[1] Certain special funds belonging to a county were loaned by the county commissioners in December, 1838, to an individual who gave therefor his note with sureties, due in one year. At their March term, 1839, the county commissioners directed an order to be entered to the effect that the loans previously made should be extended to March, 1841, on condition that the borrowers should keep the county secure in the payment of their notes, and pay the interest annually. Held, this was not an extension of time which discharged the sureties, but an expression of the sense of the county commissioners that the money, instead of being called in at the end of the year, might with propriety be loaned longer.[2] A party was appointed assignee of the state bank to wind up its affairs (the period allowed for that purpose being four years), and gave bond with sureties for the performance of his duties in that regard. A part of such duties was to meet with others each year and burn all notes and certificates of the bank which had been redeemed. About the expiration of the four years the legislature extended the time for winding up the affairs of the bank two years more. Held, the sureties were not liable for anything which occurred after the first four years, but were liable for defaults of the principal in not destroying notes, etc., which occurred during such four years.[3]

§ 325. **When surety discharged by extension of time after judgment.**—If, after a judgment is rendered against principal and surety, the creditor, by binding agreement with the principal, extends the time of payment, it is generally held that the surety is discharged, the same as if such time had been given before the judgment was rendered.[4] "A judgment does not

[1] Commonwealth v. Holmes, 25 Gratt. (Va.) 771, per Bouldin, J. To same effect, see Smith v. Commonwealth, 25 Gratt. (Va.) 780; Bennett v. The Auditor, 2 West Va. 441.

[2] Waters v. Simpson, 2 Gilman (Ill.) 570.

[3] Governor v. Lagow, 43 Ill. 134; Governor v. Bowman, 44 Ill. 499.

[4] Calliham v. Tanner, 3 Robinson (La.) 299; Pilgrim v. Dykes, 24 Texas, 383; Vankoughnet v. Mills, 5 Grant's Ch. R. 653; *contra*, see Farmers' Bank v. Horsey, 1 Harrington (Del.) 514. Holding the contrary, with hesitation, see, also, Duff v. Barrett, 15 Grant's Ch. R. 632; Duff v. Barrett, 17 Grant's Ch. R. 187. See, also, on this subject, Drake v. Smythe, 44 Iowa, 410.

create, add to, nor detract from the indebtedness of a party; it only declares it to exist, fixes the amount, and secures to the suitor the means of enforcing payment. * When the creditor obtains a judgment against the principal debtor and the surety, both are to be sure equally and absolutely bound for the debt; but why is it that a payment of the judgment by the principal debtor releases the surety, or that a payment of it by the surety subrogates him to all the rights of the judgment creditor against the principal debtor? It can only be because the relation of principal and surety continues to subsist between them, even after judgment."[1] If the creditor take from the principal a confession of judgment, and grant a stay of execution for a definite time, and such stay is part of the judgment, or there is a binding agreement that such stay shall be given, the surety is generally held to be discharged thereby.[2] Such agreement must, in order to have this effect, be binding,[3] and for a definite time.[4] And if the time for which execution is stayed does not exceed that in which judgment could have been obtained by the ordinary course, it has been held there is not such a giving of time as will discharge the surety.[5] If, by virtue of a statutory provision, the remedy of the surety against his principal is not impeded by the stay of execution, it has been held the surety is not discharged thereby.[6] By the terms of a replevin bond, the sureties therein agreed that if a judgment for money was rendered against the the principal, it might also be rendered against them. By agreement with the principal, judgment was had against him and the sureties, and by the terms of the same, judgment execution was stayed one year. Held, the sureties were not discharged, on the ground that the court had, by the virtue of the bond and the provisions of the law, jurisdiction over the sureties, and they

[1] Gustine v. Union Bank, 10 Robinson (La.) 412, per Murphy, J.

[2] Wingate v. Wilson, 53 Ind. 78; Fordyce v. Ellis, 29 Cal. 96; State v. Hammond, 6 Gill & Johns. (Md.) 157; Ward v. Johnson, 6 Munf. (Va.) 6; Clippinger v. Creps, 2 Watts (Pa.) 45; Bank of Steubenville v. Leavitt, 5 Ohio, 208.

[3] Wayne v. Kirby, 2 Bailey Law (So. Car.) 551; Woolworth v. Brinker, 11 Ohio St. 593.

[4] Miller v. Porter, 5 Humph. (Tenn.) 294.

[5] Ferguson v. Childress, 9 Humph. (Tenn.) 382; Fletcher v. Gamble, 3 Ala. 335; Suydam v. Vance, 2 McLean, 99; Barker v. McClure, 2 Blackf. (Ind.) 14.

[6] Grimes v. Nolen, 3 Humph. (Tenn.) 412; Williams v. Wright, 9 Humph. (Tenn.) 493.

were bound by any judgment it might render to which they did not object. The court said this was not like giving time after a judgment had been rendered, because here the giving of time was part of the judgment, and the sureties being presumed to be in court, and not objecting, remained bound.[1]

§ 326. **Miscellaneous cases holding surety discharged by extension of time after judgment.**—A creditor, by directing the sheriff to put off the sale of property of the principal, taken in execution, to a day after the return day, and to suffer it to remain in possession of the principal, releases the sureties from that, and any subsequent execution.[2] If, after a sale of real estate by order of the orphan's court, the guardian of one of the heirs takes a judgment from the administrator who made the sale, for the share of his ward, and gives a stay of execution for one year, the surety of the administrator is released.[3] Where after a judgment was recovered against a principal, the creditor entered of record in the case that execution was stayed for a definite time, it was held the surety was discharged.[4] The defendant in a suit in which judgment had been recovered, gave a voluntary bond with two sureties, which provided for the payment of the judgment in cotton, by a certain date. Afterwards the defendant sued out a writ of error to the Supreme Court, giving other sureties. By consent of the defendant, the judgment was affirmed in the Supreme Court, and an agreement was made between the defendant and the creditor, that execution should be stayed a definite time. Held, the sureties on the voluntary bond were discharged.[5] A creditor having commenced suit against the principal and held him to bail thereupon, agreed to waive further proceedings, upon the principal giving him a warrant of attorney to confess judgment, on which warrant was a memorandum that no execution should issue on the judgment for three years. Held, the surety was discharged.[6] The principal in a writ of error bond agreed with the adverse party that

[1] Hershler v. Reynolds, 22 Iowa, 152. This case can only be sustained on the ground that, under the peculiar circumstances, the sureties must be presumed to have consented to the judgment.

[2] Bullitt's Exrs. v. Winstons, 1 Munf. (Va.) 269.

[3] Sawyers v. Hicks, 6 Watts. (Pa.) 76.

[4] Smith v. Rice, 27 Mo. 505.

[5] Comegys v. Booth, 3 Stew. (Ala.) 14.

[6] Nisbet v. Smith, 2 Brown's Ch. R. 579.

the judgment should be affirmed, that he would deliver indorsed bills for the amount of the debt, payable by instalments, and that no execution should be levied, except in the event of the non-payment of the bills, and it was held that the sureties in the bond were discharged.[1] A became surety of the defendants in an execution for the delivery to the sheriff at a day certain of certain goods levied on. After that day, the original award on which the execution issued, was, by consent of the parties in the case, referred back to the arbitrators on exceptions filed, and the award was confirmed by agreement, and three months stay of execution was given. Held, the execution was discharged, and A released by the extension of time.[2]

§ 327. **Whether surety on specialty discharged by parol agreement for extension.**—With reference to the effect of a parol agreement for extension of time on the liability of a surety who is bound by a sealed obligation, the decisions vary greatly. It has been held that a parol agreement to give time under such circumstances is not binding, because a specialty cannot be discharged, controlled, or in any way affected by a contract of less dignity than itself.[3] A court which held the above, also held that where, in such a case, acts had been done under the parol agreement, and in pursuance of it, the surety was thereby discharged, because, the parol agreement being executed, it was not the agreement alone, but the things done under it, which was relied upon.[4] Other courts hold that the sealed instrument by which the surety is bound, may be discharged by an extension of the time of payment, by a writing without seal, or by a verbal agreement.[5] Still other courts, while admitting that a surety who is bound by a specialty may, in equity, be discharged by a parol agreement for extension, have held that such parol agreement cannot be set up as a defense at law.[6] The strong tendency

[1] Comegys *v.* Cox, 1 Stew. (Ala.) 262.

[2] Blaine *v.* Hubbard, 4 Pa. St. 183.

[3] Carr *v.* Howard, 8 Blackf. (Ind.) 190; Tate *v.* Wymond, 7 Blackf. (Ind.) 240.

[4] Dickerson *v.* Commissioners of Ripley Co. 6 Ind. 128. On same subject and to same effect, see White *v.* Walker, 31 Ill. 422.

[5] Leavitt *v.* Savage, 16 Me. 72. See, on this subject, Gott *v.* State, 44 Md. 319.

[6] Steptoe's Admr. *v.* Harvey's Exr. 7 Leigh (Va.) 501; Devers *v.* Ross, 10 Gratt. (Va.) 252; Davey *v.* Prendergrass, 5 Barn. & Ald. 187; Wiltmer *v.* Ellison, 72 Ill. 301.

of the later decisions is, however, as elsewhere shown, to permit the surety to make and rely upon, at law, any defense which he can sustain in equity, except in special cases where law cannot afford adequate relief.

§ 328. **When surety discharged by extension of time if fact of suretyship does not appear from the obligation.**—Where the fact of suretyship does not appear from the obligation, but the creditor, when he grants an extension of time to the principal, knows of such suretyship, the surety is discharged, the same as if the fact of suretyship appeared from the obligation.[1] But if the fact of suretyship does not appear from the obligation, and the creditor does not know of it when he grants the extension, the surety is not thereby discharged.[2] By a composition deed, certain creditors extended the time of payment to the principal for two years absolutely, and longer if he complied with certain terms. The creditor was the indorsee of a bill of exchange accepted by A for the accommodation of the principal, but this fact was not known to the creditor when he made the composition deed. He did, however, know that some of the parties on some of the paper of the principal were sureties, but he did not know which were such sureties. Held, A was discharged by the giving of time. The court said: "We think that if the effect of the deed were to alter the position of the parties who should turn out to be sureties, it was wilfully done, and as inequitable as if they had express notice who those parties were."[3]

§ 329. **Giving time to principal does not discharge surety if remedies against surety reserved.**—If the creditor extends the time of payment to the principal, but at the same time expressly reserves all remedies against the surety, the surety is not discharged by such extension.[4] With reference to this matter it has been said: "The giving of time to the principal debtor with a

[1] Greenough *v.* McClelland, 2 Ellis & Ellis, 424; F. & M. Bank of Lexington *v.* Cosby, 4 J. J. Marsh (Ky.) 366; Pooley *v.* Harradine, 7 Ellis & Black. 431.

[2] Howell *v.* Lawrenceville Mfg. Co. 31 Ga. 663; Nichols *v.* Parsons, 6 New Hamp. 30; Agnew *v.* Merritt, 10 Minn. 308; Kaighn *v.* Fuller, 1 McCarter (N. J.) 419; Roberts *v.* Bane, 32 Texas, 385.

[3] Bailey *v.* Edwards, 4 Best & Smith, 761, per Blackburn, J.

[4] Clagett *v.* Salmon, 5 Gill & Johns. (Md.) 314; Wyke *v.* Rogers, 1 DeGex, Macn. & Gor. 408; Hagey *v.* Hill, 75 Pa. St. 108; Boaler *v.* Mayor, 19 J. Scott (N. S.) 76; Price *v.* Barker, 4 Ellis & Black. 760; Webb *v.* Hewitt, 3 Kay & Johns. 438; Owen *v.* Homan, 13 Beavan, 196; *contra*, Gustine *v.* Union Bank, 10 Robinson (La.) 412.

reservation of the remedies, has in many cases the appearance of absurdity, because, when distinctly understood, it seems to be almost a flat contradiction in terms. Such a reservation of remedies, in order to hold the surety, must amount to this: that the creditor agrees to give time to the debtor, and yet they both agree that the surety may at any time force the creditor to proceed against the principal by a bill *quia timet*, or by paying the whole debt, have an assignment of all the securities, and proceed immediately himself against the principal debtor, or in any mode authorized by the assigned securities. Such an agreement, reserving the remedies, might not in many cases be of the least benefit to the principal debtor, since it leaves him entirely at the mercy of his surety; yet if the parties do so expressly contract, the surety can have no cause to complain that the implied contract has been altered or impaired in any way to his prejudice, and therefore, he cannot be discharged."[1] It has also been said that "the debtor cannot complain if the instant afterwards the surety enforces those remedies against him, and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him. * It is very obvious that a principal debtor may gain little or nothing by such a composition as this with his creditor, inasmuch as he is left liable to the like proceedings against him by his sureties, which his creditor might have instituted if no composition had been made. But if he pleases to subject himself to that liability by voluntarily executing an agreement which has that effect, there is no legal reason why he should not be held to that agreement."[2] Again, it has been said, that the reservation of remedies against the surety "rebuts the presumption that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him."[3] In order

[1] Salmon v. Clagett, 3 Bland's Ch. R. (Md.) 125, per Bland, C.

[2] Sohier v. Loring, 6 Cush. 537, per Metcalf, J.

[3] Kearsley v. Cole, 16 Mees. & Wels. 128, per Parke, B.

that the extension of time in such a case shall not discharge the surety, the remedies against him must be distinctly and explicitly reserved. "A stipulation of that kind is, in many cases, so very absurd that it must be seen plainly."[1] A creditor agreed to give time to the principal, but at the same time reserved the right to sue when requested by the sureties, and it was held the sureties were not discharged.[2] When at the time an agreement for extension between principal and creditor was made, it was also agreed between them that the surety should not be discharged, but should have the right at any time to pay the debt, and proceed against the principal, it was held the surety was not discharged.[3] After judgment had been recovered against principal and sureties, the principal and the creditor made an agreement for extension of time, and at the same time stipulated that the lien of the judgment should remain unimpaired against all the parties thereto: Held, that under this agreement it was the duty of the principal to procure the consent of the surety to the extension; and if he did not, the consideration for the agreement failed, the creditor was not bound by it, and the surety was not discharged.[4] Where, by a vote of creditors under the bankrupt act, a composition less than the full amount is accepted and time given, the fact that a deed releasing the principal is afterwards executed, in which the remedies against the sureties are reserved, will not prevent the release of the sureties. The time having been once given by the vote, the sureties were then discharged, and could not be rendered liable by subsequent matter without their consent.[5] Where a creditor agreed with the principal to extend the time of payment for six months, and in the same agreement the principal reserved the right to pay at any time within the six months, it was held the surety was discharged.[6]

[1] Boultbee v. Stubbs, 18 Vesey, 20, per Lord Eldon, C.

[2] Rucker v. Robinson, 38 Mo. 154.

[3] Morse v. Huntington, 40 Vt. 488.

[4] Hunt v. Knox, 34 Miss. 655.

[5] Wilson v. Lloyd, Law Rep. 16 Eq. Cas. 60.

[6] Wright v. Bartlett, 43 New Hamp. 548.

CHAPTER XV.

OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY ALTERATION OF THE CONTRACT.

§ 330. **Surety discharged by alteration of the contract—General observations.**—As has already been seen, the surety is discharged if the time of payment is, by a binding agreement extended for a definite period without his consent; the chief reason for such discharge being that his contract is in such case altered. In this chapter, alterations of the contract in other regards than by an extension of time, will be treated of. It is a general rule that any agreement between the creditor and principal, which

varies essentially the terms of the contract by which the surety is bound, without the consent of the surety, will release him from responsibility.[1] "The contract by which a surety becomes bound is voluntary on his part, without profit or advantage, and without having in view the prospect of gain. It is an act of benevolence to the obligor, and of convenience to the obligee, and of emphatic use to both. The obligations of social duty require therefore that he should be dealt with in fairness, and in a spirit of the utmost good faith. The obligor and the obligee are bound to know that if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs, and if they will not do so, they take upon themselves the hazard, and thus loosen the bonds of the surety."[2]

§ 331. **Surety discharged by changing date of note or adding interest.**—Altering the date of a note after it has been signed by a surety, discharges him, if such alteration is made without his consent.[3] If the note is dated, but the amount is blank when the surety signs, he is discharged by an alteration of the date.[4] The date of a note was altered from 1836 to 1838, by the holder, in the presence of the surety, but without his consent. The original date of the note should have been 1838, and the alteration was made after the note would have been due with either date. Held, the surety was discharged, because the application of the statute of limitations to the note was changed, and the surety was put to the trouble and expense of showing the truth.[5] If, at the time the surety signs a note, it does not draw interest, and the principal afterwards, without the consent of the surety, interlines the words "with interest from date," the surety is discharged.[6] So the addition to a note, after it is signed by a surety, of a clause making the interest payable annually or semi-annually, without the surety's consent, and with the knowledge of payee or party taking the note, discharges the surety.[7] And where, in such a

[1] United States *v.* Tillotson, 1 Paine, 305; Eneas *v.* Hoops, 10 Jones & Spen. (N. Y.) 517.

[2] Hobbs *v.* Rue, 4 Pa. St. 348, per Coulter, J. Holding that altering the rate of interest discharges the surety, Harsh *v.* Klepper, 28 Ohio St. 200.

[3] Britton *v.* Dierker, 46 Mo. 591.

[4] Bank of Com. *v.* McChord, 4 Dana (Ky.) 191.

[5] Miller *v.* Gilleland, 19 Pa. St. 119.

[6] Kountz *v.* Hart, 17 Ind. 329. To similar effect, see Hart *v.* Clouser, 30 Ind. 210; Glover *v.* Robbins, 49 Ala. 219; Locknane *v.* Emmerson, 11 Bush (Ky.) 69.

[7] Dewey *v.* Reed, 40 Barb. (N.Y.) 16;

case, the surety first signed the note in pencil, with a promise to "ink over" his signature afterwards, and the note was altered by making the interest payable annually, and the surety afterwards, without knowing of the alteration, "inked over" his signature, it was held he was discharged.[1] Where it was agreed between the principal and creditor that the note should bear interest, but no such provision was contained in the note when it was signed by the surety, and it was afterwards, without the consent of the surety, changed by the principal and creditor so as to conform to the agreement between them, it was held the surety was discharged.[2] The effect of a material alteration of a note as aforesaid, is to entirely destroy the surety's liability thereon. The alteration cannot be erased and the surety held on the note as it originally was. The identity of the instrument has been destroyed, and on grounds of public policy the liability of the surety is entirely gone.[3] Where a surety signed a blank note, which the principal afterwards filled up so as to bear usurious interest, it was held, the surety was not thereby discharged, because the note, notwithstanding its form, would only bear interest at the legal rate.[4] The maker of a note wrote on its back: "I hereby agree to pay ten per cent. interest on this note hereafter," and signed it. Held, this was not an alteration of the note, but was a new contract to pay greater interest, which no more changed the note than if written on a separate piece of paper, and the surety was not thereby discharged.[5]

§ 332. **How surety and principal affected by addition of new party to a note.**—If, after a note has been executed by a surety and delivered, a new surety signs the note, this is a material alteration, which discharges the surety, notwithstanding the fact that it is a benefit to him.[6] The same thing was held, where after a note had been signed by a surety, the principal, without the consent of such surety, procured another surety to sign it, and afterwards delivered it to the payee, who then had knowledge

Marsh *v.* Griffin, 42 Iowa, 403; Neff *v.* Horner, 63 Pa. St. 327.

[1] Boatt *v.* Brown, 13 Ohio St. 364.

[2] Fulmer *v.* Seitz, 68 Pa. St. 237.

[3] Neff *v.* Horner, 63 Pa. St. 327; Dewey *v.* Reed, 40 Barb. (N. Y.) 16; Fulmer *v.* Seitz, 68 Pa. St. 237; Marsh *v.* Griffin, 42 Iowa, 403; Locknane *v.* Emmerson, 11 Bush (Ky.) 69; Glover *v.* Robbins, 49 Ala. 219.

[4] Selser *v.* Brock, 3 Ohio St. 302.

[5] Huff *v.* Cole, 45 Ind. 300.

[6] Bank of Limestone *v.* Penick, 2 T. B. Mon. (Ky.) 98; Gardner *v.* Walsh, 5 Ellis & Black. 83; Bank of Limestone *v.* Penick, 5 T. B. Mon. (Ky.) 25.

of the facts.[1] Adding to a note the name of an additional surety, with the assent of the payee, and of the personal representative of the original deceased surety, with the agreement that the estate shall not be thereby released, is not an alteration which discharges the surety.[2] Where a note, signed by principal and surety, was, by its terms, payable at a bank, and it was expected that it would be discounted by the bank, but the bank would not discount it unless it was also signed by the holder, who, thereupon signed it on its face, it was held this did not discharge the surety, as it was the same as if the creditor had indorsed the note.[3] But when a note, after it had been delivered, was signed by a stranger as joint and several maker, it was held to be such an alteration as discharged the surety.[4] If a surety sign a note after it has been executed and delivered by the principal, this, it has been held, is not such an alteration of the note as will discharge the principal. The contract of a surety need not be contemporaneous with that of the principal. The liability of the principal is not increased or diminished by the addition of a surety. The principal is liable to pay the whole debt without contribution, while, if additional sureties are added, one might become insolvent and contribution between them and the original surety be complicated.[5]

§ 333. **Instances of cases in which alteration of note will and will not discharge surety.**—The alteration of a note at the time of its delivery, by adding the words "payable at 53 Lake street," is material, and if done without the assent of the guarantors, discharges them.[6] The addition to a note of a clause, making it payable in gold, when gold is of greater value than legal tender money, in which the note might be paid, discharges the surety.[7] Adding to a non-negotiable note, the words "or order," thereby making it negotiable, is a material alteration, which discharges the surety.[8] Where the holder of a note struck out

[1] Hall v. McHenry, 19 Iowa, 521. In Keith v. Goodwin, 31 Vt. 268, it was held that if a surety entrusts a note signed by him to the principal, he thereby gives the principal authority to get additional sureties till the note is fairly launched on the market, and that in such case the signing of a new surety does not discharge the first one.

[2] Voiles v. Green, 43 Ind. 374.

[3] Bowser v. Rendell, 31 Ind. 128.

[4] Willace v. Jewell, 21 Ohio St. 163.

[5] Miller v. Finley, 26 Mich. 249. To similar effect, see Stone v. White, 8 Gray, 589. On same subject, see Pulliam v. Withers, 8 Dana (Ky.) 98.

[6] Pahlman v. Taylor, 75 Ill. 629.

[7] Bogarth v. Breedlove, 39 Texas, 561; Hanson v. Crawley, 41 Ga. 303.

[8] Haines v. Dennett, 11 New H. 180.

the name of one of the indorsers, it was held that it operated as a discharge of a subsequent indorser, for such indorser, if he had paid the note, would, if no erasure had been made, have had a right to recover from the indorser whose name had been erased.[1] A note was guarantied by the payee in the following words: "I guaranty the collection of the within note." The holder tore off the words "the collection of the," leaving the guaranty to read "I guarantee the within note." Held, the guarantor was discharged.[2] After principal and surety had signed a note, and before its delivery, another party, without the consent of the surety, signed his name under that of the surety. After the delivery of the note, the holder cut off the name of the last signer. Held, this was a spoliation of the instrument which discharged the surety.[3] Principal and surety signed a note for $3,000, which the principal presented for discount to the payee, who refused to discount it for that sum, but wrote across its face as follows: "$2,000. This note was discounted for $2,000, which amount is due upon it." Held, the surety was discharged. The note had no validity for any amount, until it was delivered to the payee, and when so delivered it was a note for $2,000, and the surety had not agreed to be bound by any such note.[4] If the surety signs a note in which the amount,[5] or time of payment,[6] is left blank, and entrusts it to the principal, he is bound to a *bona fide* holder of the note, without notice, for such amount and time as the principal may insert in the blanks. Where the facts were such as to justify the belief that the principal was the agent of the surety, for the purpose of altering a note from a larger to a smaller sum, it was held the surety was not discharged by such alteration.[7] Where a surety signs a note, complete in every re-

[1] Curry *v.* The Bank of Mobile, 8 Port. (Ala.) 360.

[2] Newlan *v.* Harrington, 24 Ill. 206.

[3] Hall *v.* McHenry, 19 Iowa, 521.

[4] Portage Co. Branch Bank *v.* Lane, 8 Ohio St. 405; *contra,* M. & M. Bank *v.* Evans, 9 West Va. 373. Holding surety discharged when holder of note gives it up to principal, erasing name of surety, and taking new note for the amount from principal, see Rhodes *v.* Hart, 51 Ga. 320.

[5] Simpson's Exrs. *v.* Bovard, 74 Pa. St. 351. To similar effect, see Patton *v.* Shanklin, 14 B. Mon. (Ky.) 13.

[6] Johns *v.* Harrison, 20 Ind. 317; Waldron *v.* Young, 9 Heisk. (Tenn.) 777. On this subject, when the date is blank, see Emmons *v.* Meeker, 55 Ind. 321.

[7] Ogle *v.* Graham, 2 Pen. & Watts (Pa.) 132. Holding the surety not liable when a blank in a bond is filled for a larger sum than he stipulated to become liable for, see Hastings *v.* Clendaniel, 2 Del. Ch. R. 165.

spect, and permits the principal to take it to a bank for discount, and the principal alters it to a larger amount, the surety is discharged. In such a case it was said that: "The sureties assume a certain definite obligation, the extent of which is clearly and fully stated in the writing they sign. To that extent they give confidence and credit to the principal, but no farther." The note naturally passes into the hands of the principal. "The party receiving the note gives the confidence and trust to the party from whom he receives it. * The surety may safely stipulate as such for a certain stated amount, and limit his liability to that sum. He does so when he puts his name to an instrument wholly filled up." It is otherwise where he signs a blank note.[1] Where a note with sureties is surrendered, and a new note having the same names is taken in extension by reason of representations that the signatures are genuine, the holder may, on discovering that the signatures of the sureties are forged, repudiate the new contract, and hold the sureties on the old note.[2] Two sureties signed a note, and afterwards, without their consent, the name of a surety who had signed before them, was stricken out. The payee, when he took the note, inquired why the name had been erased, and was told by the principal that it had been done by consent. Held, the two sureties were discharged. The erasure appearing on the face of the paper was sufficient to put the payee upon inquiry, and charge him with knowledge of the facts.[3]

§ 334. **Surety not discharged if after alteration is made he ratifies it.**—If, after an alteration has been made in a note, which would operate the discharge of the surety, he assents to such alteration, he will remain bound without any new consideration. "If the alterations had been made with his knowledge and consent, it is very clear that the note would not have been void. * Nor is the rule different where the assent is subsequently given."[4] After a note which had been altered came due, the surety urged the holder to bring suit on it, and suit was instituted against both principal and surety, and the surety furnished bonds for an attachment, in aid against the property of the principal. The surety then admitted that he would have to pay

[1] Agawam Bank v. Sears, 4 Gray, 95, per Dewey, J.

[2] Kincaid v. Yates, 63 Mo. 45.

[3] McCramer v. Thompson, 21 Iowa, 244.

[4] Pelton v. Prescott, 13 Iowa, 567. Holding that if guarantor consents to alteration, he cannot complain of it, see Knœbel v. Kircher, 33 Ill. 308.

whatever sum was not made out of the principal, and the words added to the note were erased at his request. Held, the surety had ratified the alteration, and could not complain of it.[1] Certain sureties were the solicitors for their principal in making the original contract, and knew of all the subsequent transactions by which the contract signed by them as sureties was varied, and acted as solicitors for some of the parties in the subsequent transactions, and prepared some of the documents required by such transactions. Held, they were not discharged, upon the ground that from the circumstances, they must be presumed to have consented to whatever changes were made.[2] If at the time a surety does such acts as would amount to a ratification of the alteration, he does not know of such alteration, he will not be presumed to have ratified the same.[3]

§ 335. **When surety on bond discharged if it is altered.**—A material alteration of a bond signed by a surety, has the same effect to discharge him as in the case of a note or instrument not under seal. Thus, where the obligee in a replevin bond permitted one of the principals to erase his name from it, the sureties were held to be discharged.[4] If, after several sureties have signed a bond, the name of one is erased with the consent of some of the sureties, and without the consent of others, those who consent remain bound and those who do not are discharged.[5] Where, after an assessor's bond had been signed by himself and sureties, the penalty of the bond was erased and double the amount inserted without the consent of such sureties, and the bond was afterwards signed by other sureties and approved, it was held the first sureties were discharged.[6] Where, after a sheriff's bond had been signed by certain sureties, its penalty was without their consent reduced, and it was then signed by other sureties, it was held that the last sureties were bound and the first were discharged.[7] If a paper intended to be a bond, is signed in blank as to the

[1] Gardner v. Harback, 21 Ill. 129.

[2] Woodcock v. Oxford & Worcester R. R. Co., 1 Drewry, 521.

[3] Benedict v. Miner, 58 Ill. 19; Boalt v. Brown, 13 Ohio St. 364.

[4] Martin v. Thomas, 24 How. (U. S.) 315.

[5] Smith v. United States, 2 Wallace (U. S.) 219. To similar effect, see The State v. Blair, 32 Ind. 313. To a contrary effect, where the name of one surety in a guardian's bond was erased and another substituted, see Hill v. Calvert, 1 Rich. Eq. (So. Car.) 56.

[6] People v. Kneeland, 31 Cal. 288.

[7] People v. Brown, 2 Douglass (Mich.) 9. To similar effect, see Mitchell v. Burton, 2 Head (Tenn.) 613.

sum by a person as surety, and the surety gives no one any authority to fill up the blank, and the blank is afterwards filled without the surety's consent, he is not bound.[1] If, however, a surety signs a bond, leaving blank the penalty, date and names of the obligees, expecting his principal will properly fill the blanks, and he does properly fill them and deliver the bond, the surety is liable.[2]

§ 336. **When surety on bond not discharged by its alteration.**—It has been held that if a principal gets the name of a surety to his official bond, and afterwards, without the consent of such surety he gets another surety to sign the bond, this does not discharge the first surety.[3] Where A, as one of two sureties, signed a bond to dissolve an attachment, but upon his answers as to his estate the bond was not approved, and he went away, and afterwards an additional surety was obtained and the bond was then approved, without anything further being said to A, it was held he was liable on the bond.[4] After a bond had been signed by three sureties, the names of two were accidentally cut off, and they afterwards signed the bond without attaching any seal to their names. Held, the other surety was not discharged.[5] If at the time a surety signs a bond, there is a blank in the body thereof at the place where his name ought to be, the insertion of his name in such blank without his knowledge, will not discharge him.[6] An administrator procured his bond from the clerk's office some time after it had been signed by himself and several sureties, and approved by the court. He then struck out the name of one of the sureties and inserted therein the name of another person as surety, and the bond was signed by such other person. This was done without the knowledge of the clerk or of any of the parties to the bond, except the one whose name was stricken out. Held, the surety whose name was stricken out, and all the sureties, were liable in equity on the bond.[7] A principal and his sureties were sued by a city for not complying with a written contract to construct water works.

[1] Rhea v. Gibson's Exr. 10 Gratt. (Va.) 215. To similar effect, see People v. Organ, 27 Ill. 27.

[2] Wright v. Harris, 31 Iowa, 272.

[3] Governor v. Lagow, 43 Ill. 134; State v. Dunn, 11 La. An. 549.

[4] Sampson v. Barnard, 98 Mass. 359.

[5] Rhoads v. Frederick, 8 Watts (Pa.) 448.

[6] Smith v. Crooker, 5 Mass. 538; The State v. Pepper, 31 Ind. 76.

[7] Harrison v. Turbeville, 2 Humph. (Tenn.) 242.

They offered to prove that the contract had been changed by parol, completed as changed and accepted by the city. Held, the fact could not be shown, as the city could only contract through its corporate authorities by ordinance.[1] A party guarantied the payment of rent, reserved by a lease under seal. Afterwards the lessor agreed by parol to reduce the monthly rent, and the new agreement was completely executed. In a suit on the guaranty, it was held, that as the parol agreement had been executed, it superseded the lease, and the surety was discharged at law.[2]

§ 337. **When surety discharged if creditor advance to principal greater or less amount than that for which surety becomes liable.**—Certain parties made a mortgage, conditioned to indemnify the mortgagee from all advances, etc., which he should "incur or make, on account of the said * (principal) not to exceed at any one time the sum of $10,000." The mortgagee advanced on account of the principal a much greater sum, and it was held the mortgagors were not discharged by that fact. The object of the restriction of the amount to be advanced, was to limit their liability to that sum, and not to prevent the mortgagor from giving the principal a credit beyond that amount.[3] The same thing was held where a guaranty was as follows: "I guaranty the payment of all sums which B may owe C for goods which he may sell B, provided that the whole amount which B shall owe C at any one time shall not exceed $1,100, it being the understanding that I am in no event to be liable for more than that sum. And if B shall fail punctually to pay C any sum which may become due to him, I am to have 90 days after demand in writing made on me, under this guaranty, to pay the amount for which he may be so in default; and this guaranty is upon the condition that said C shall, once in every eight months from the date hereof, give me notice in writing, of said B's account with him."[4] Certain individuals mortgaged divers lots owned by them, to a bank, to secure a loan to be made to the trustees of Shawneetown, not to exceed $20,000. The loan was to run ten years, and the money to be

[1] Sacramento v. Kirk, 7 Cal. 419.

[2] White v. Walker, 31 Ill. 422. Holding, that in such a case, where the parol agreement has not been executed the surety is not discharged, see Chapman v. McGrew, 20 Ill. 101.

[3] Clagett v. Salmon, 5 Gill & Johns. (Md.) 314.

[4] Curtis v. Hubbard, 6 Met. (Mass.) 186.

used for walling the banks of a river adjacent to the lots. The bank loaned the trustees almost $40,000 for that purpose, and took their note for it, and brought a bill to foreclose the mortgage. Held, on demurrer to the bill, that it did not pretend to show that the loan was made in pursuance of the mortgage. The mortgage limited the loan to $20,000, the bill showed it was for twice that sum. "The sureties have never undertaken to guaranty the performance of such an agreement as was made. * It is not an answer to say that the sureties are only sought to be held responsible to the extent of $20,000, for it may well be that they would not have become responsible for any amount, but for the assurance that the loan would be limited to the amount stipulated."[1] The plaintiff agreed to let one N have $10,000 in cash, and to convey to him, clear of incumbrance, a tract of land worth $10,000, and to take N's two notes therefor, payable in one and two years each, for $10,000. N was also to pledge certain railroad shares as collateral security, and furnish the bond of responsible men, conditioned that they would take such shares and notes at the expiration of the two years, and pay such sum as should remain unpaid upon the notes. Two sureties, with the knowledge of this agreement, executed such a bond. Afterwards, by an agreement between the plaintiff and N, the plaintiff only let N have $8,317, retaining the balance for interest in advance on the two notes, and instead of conveying the land clear to the plaintiff, took back a mortgage on it to secure the purchase money. Held, the sureties were discharged. The court said "The current of authorities seems to run very decidedly one way, and is to the effect that any variation between the principal and the creditor, of the terms of the original understanding, for the performance of which the surety became responsible, will discharge the surety if done without his assent, however the change may affect his interest."[2] Declaration that in consideration that A would give B "credit for the amount of 400*l.*" the defendant would guaranty B's dealings "to the amount of 400*l.* aforesaid." B only bought 300*l.* worth of goods, and the defendant being sued on the guaranty, set up that as 400*l.* worth of goods were not advanced, he was not liable. Held, he was liable. The proper construction of the guaranty was that the defendant was to be liable to the ex-

[1] Ryan *v.* Shawneetown, 14 Ill. 20, per Caton, J.

[2] Watriss *v.* Pierce, 32 New Hamp. 560, per Eastman, J.

tent of 400*l*. If it were otherwise, B might, by his refusal to buy 400*l*. worth of goods, have prevented the defendant from becoming liable at all.[1]

§ 338. **Surety discharged if variation of contract is for his benefit.**—If a material alteration is made in the contract without the surety's consent, he is discharged, even though the alteration may be for his benefit. With reference to this, it has been said: "No principle of law is better settled at this day than that the undertaking of the surety, being one *strictissimi juris*, he cannot, either at law or in equity, be bound farther or otherwise than he is by the very terms of his contract. * Neither is it of any consequence that the alteration in the contract is trivial, nor even that it is for the advantage of the surety. *Non haec in foedera veni* is an answer in the mouth of the surety, from which the obligee can never extricate his case, however innocently or by whatever kind intentions to all parties, he may have been actuated. * He is not bound by the old contract, for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it; neither can it be split into parts so as to be his contract to a certain extent and not for the residue; he is either bound *in toto* or not at all."[2] A, for B's accommodation, indorsed B's note to C. It was agreed between all the parties at that time, that B should give C a mortgage upon his stock of goods as a security for the debt, and this was done as agreed. C failed to record the mortgage, and, at the end of three months, canceled it and took another. Held, A was entirely discharged, notwithstanding it was affirmatively proved that the mortgage, if duly recorded and uncanceled, would have been no protection to the surety by reason of older liens; and this on the ground that the contract had been altered without the surety's consent.[3] Where after a surety had become liable for an annuity the rate of the annuity was, without his consent, altered from 20*l*. to 9*l*. per cent., it was held he was discharged. The Court said: "Whether this alteration was likely to be injurious to the surety, I will not inquire; the alteration, whether beneficial or not, should not have been made without his full knowledge and

[1] Lindsay *v*. Parkinson, 5 Irish Law, Rep. 124.

[2] Bethune *v*. Dozier, 10 Ga. 235, per Lumpkin, J. To similar effect, see Rowan *v*. Sharp's Rifle Manf. Co. 33 Ct. 1.

[3] Atlanta National Bank *v*. Douglass, 51 Ga. 205.

assent; the surety has a right to know what is the contract to which he is party as surety."[1]

§ 339. **When surety on lease discharged by alteration of contract.**—Before the expiration of the lease of a house and lot, the house was distroyed by fire, and by mutual agreement between the landlord and tenant, the lease was canceled. Held, this was not such an alteration of the contract as discharged a surety on the lease for rent which had accrued prior to the time of cancellation. The court said: "The obligation which the lessees undertook to perform, so far as it relates to the payment of the rent which had then accrued, was not changed; it remained in the precise terms it was before; it was, as to the then future, the executory portion of it that was abrogated. * The obligation to pay the rent for which judgment has been recovered, has not in letter or spirit been changed, nor is it pretended that any right of the defendant growing out of the contract is, so far as it relates to that obligation, in any respect altered or impaired."[2] A lease with surety provided for the payment of rent quarterly. The lessee paid, and the landlord accepted, rent monthly for some time, but there was no agreement that the rent should be so received. Held, the contract was not changed, nor the surety discharged.[3] Where a lease with surety provided for the payment of $43 a month as rent, and the landlord subsequently agreed to take $40 a month, it was said that this did not discharge the surety.[4] A yard, shed and frame dwelling house were rented for $375 a month, and a stranger guarantied the rent. The lessor took back the dwelling house and rented it to another, and reduced the rent for the remainder of the premises to $300 a month, and it was held the guarantor was thereby discharged.[5] A lease with surety provided that if the premises should be destroyed by fire, the lease should thereupon terminate. The premises were totally destroyed by fire, but the tenant still held the site and refused to surrender. Held, the surety was discharged from the time the premises were destroyed, as the lease was thereby terminated, and if there was a

[1] Eyre v. Hollier, Lloyd & Goold (Temp. Plunket) 250, per Plunket, C.

[2] Kingsbury v. Westfall, 61 New York, 356, per Gray, C. To similar effect, see Kingsbury v. Williams, 53 Barb. (N. Y.) 142.

[3] Ogden v. Rowe, 3 E. D. Smith (N.Y.) 312.

[4] Ellis v. McCormick, 1 Hilton (N. Y.) 313.

[5] Penn v. Collins, 5 Robinson (La.) 213.

further holding it was not under the lease.[1] Principal and surety executed a lease by which they covenanted to return the property in good order. The principal held over for about a year after the expiration of the term, without any demand for possession by the lessors. Held, the surety was not liable for rent during the holding over, as that was by the express or implied consent of the lessors, and amounted to a new contract.[2]

§ 340. **When judgment against principal does not bar suit against surety.**—The recovery of a judgment against the principal alone, where the suit is not on the obligation signed by the surety, or where the suit is on the obligation, and it is several, will not generally bar a subsequent suit for the same cause of action against the surety. Thus, it has been held that the recovery of a judgment against the principal in a lease which he signed alone, is no bar to an action against him and a guarantor on a guaranty executed by him and the guarantor jointly. The court said: "I see no impropriety or difficulty in a party being more than once sued for the enforcement of the same duty or obligation, if he have given more than one contract in different forms for its performance."[3] A judgment in assumpsit against an officer for his default, the suit not being on his official bond, is no bar to a subsequent suit in a debt against him and the surety on his bond.[4] Two parties indorsed a note as joint guarantors, and judgment was recovered against one of them on the guaranty. Held, this was a bar to a suit on the guaranty against the other guarantor. The court said that upon the recovery against one, the entire contract was merged in the judgment, and there could be no recovery thereon against the other. "There is no rule better settled than that a judgment against one on a joint contract of several, bars the action against the others, even though the latter were dormant partners, unknown to the plaintiff when the orginal action was brought.[5]

§ 341. **When surety not discharged because compensation of principal changed.**—Where the compensation which shall be paid the principal in an employment is not a part of the contract of

[1] Taylor v. Hortop, 22 Up. Can. C. P. R. 542.

[2] Kyle v. Proctor, 7 Bush (Ky.) 493.

[3] White v. Smith, 33 Pa. St. 186, per Thompson, J.

[4] Fireman's Ins. Co. v. McMillan, 29 Ala. 147; Commissioners v. Canan, 2 Watts (Pa.) 107. To a contrary effect, see Sloan v. Creasor, 22 Up. Can. Q. B. R. 127.

[5] Brady v. Reynolds, 13 Cal. 31, per Field, J.

the surety for his good behavior therein, a change in the amount of such compensation which does not change the duties of the principal, nor vary the risk of the surety, does not generally discharge the surety. Thus, the bond of an assistant overseer of a parish was conditioned for his good behavior "during the continuance of his said appointment." His salary, when appointed, was 16*l.* a year, but the office was not annual, nor for any definite period. After he had held the office five years, by his own consent and by vote of the authorities, his salary was reduced to 14*l.* a year, and he continued in the office, and afterwards made default: Held, the sureties on his bond were liable therefor. The court said: "If the sureties had thought that the amount of the salary was an essential ingredient in the contract, they ought to have taken care to have had a stipulation inserted in the condition of the bond that they would be liable only so long as the overseer was continued at the same salary."[1] To a declaration against a bond conditioned for the faithful performance of his duty by W so long as he should continue in the plaintiff's service in the capacity of their agent at N, and in any other capacity whatsoever, the defendant plead that W entered into the plaintiff's employment as such agent at a certain commission or percentage on the business done, and the defendant executed the bond under the agreement that he should be so paid, and that afterwards the plaintiff, without the defendant's consent, changed the mode of remuneration to a fixed salary. The bond itself said nothing about the salary, and it was held the surety was not discharged.[2] An insurance company appointed an agent to be paid by certain commissions, with a guaranty by the company that the commissions should amount to a specified sum monthly, the agency to be terminated by either party at three months' notice. The agent gave bond conditioned that he "shall faithfully conform to all instructions and directions which he, as such agent, may at any time receive from" the company. The sureties on the bond knew of the terms of the appointment of their principal when they became bound. Subsequently the agent and the company agreed that the agent should receive increased commissions, but give up all claim on the guaranty. Held, the sureties were not thereby discharged. The new agreement did not affect the identity of the office, nor

[1] Frank *v.* Edwards, 8 Wels. Hurl. & Gor. 214, per Park, B.

[2] Bank of Toronto *v.* Wilmot, 19 Up. Can. Q. B. R. 73.

the duties of the agent. He was not an agent at a fixed salary, either before or after the new agreement.[1] Where the directors of a bank, in consequence of a private loss sustained by their cashier, make him a payment of his salary for six months in advance, and he afterwards pays himself a second time by monthly instalments, for the same period, the surety on his official bond, who had bound himself for the faithful performance of his duties by the cashier, and to save the bank harmless from any negligence or misconduct on his part, and that he should render a faithful account of all moneys and effects committed to his charge, will be bound for the deficiency.[2] A bond recited that L had been appointed a railroad clerk "at a yearly salary of 100*l.*," and was conditioned for his good behavior, his duty being to sell coal. Afterwards, his compensation was changed to a commission of 6*d.* a ton on all coal sold by him, and he made more under that arrangement than 100*l.* a year. Held, the surety was discharged. The court said: "When the mode of remuneration was altered, the agency was different, and the risk of the sureties was materially increased. * The condition recites that the company have agreed to appoint the principal as their agent at a yearly salary of 100*l.*; therefore, there was a bargain between the company and the sureties that the agent should have that salary."[3]

§ 342. **Surety for conduct of principal discharged if his duties are changed.**—If the duties which the principal is to perform are varied by agreement between the principal and obligee, after the surety for the conduct of principal has become bound, such surety will generally be thereby discharged. Thus, A became surety for the good conduct of B as agent for the sale of granite for C. Afterwards, by arrangement between B and C, their contract was changed, so that B, instead of being a mere agent, became a conditional purchaser of the stone, if sold for a certain price, and responsible for all bad debts contracted under his own sales. Held, A was not liable for any of B's acts after the new agreement had been made.[4] A surety by bond for the due performance by another of the office of bank "agent," is not responsible

[1] Amicable Mutual Life Ins. Co. *v.* Sedgwick, 110 Mass. 163. Holding surety discharged by alteration of compensation of principal, and other circumstances, see Bagley *v.* Clark, 7 Bosw. (N.Y.) 94.

[2] Menard *v.* Davidson, 3 La. An. 480.

[3] Northwestern R. R. Co. *v.* Whinray, 1 Hurl. & Gor. (10 Exch.) 77, per Alderson & Pratt, B. B.

[4] Gass *v.* Stinson, 2 Sumner, 453.

for losses occurring after the nature of the agency has been changed, and the agent appointed "cashier," it appearing that the offices were not the same, and that their duties were somewhat different.[1] The bond of the agent of a hat manufacturing company provided that he should faithfully discharge the duties of his office, and account for and pay over whatever funds he should have in his hands, whenever thereto requested. At that time the agent had charge of a store belonging to the company, and his duties were to deliver hats to the proprietors, keep accounts with them, receive their promissory notes, and deliver them to the treasurer of the company, and to sell to other persons, for which services he received a commission, he guarantying the debts on sale by retail. Afterwards it was agreed between the agent and the company that the store should be discontinued, and the agent should deliver the hats in cases to the proprietors from his own store, and he was to be supplied with hats at wholesale prices for retailing on his own account, and was to keep the books and account with the company. Held, the acts of the agent under the new arrangement were not covered by the bond.[2] After a surety became liable for the conduct of a clerk in a bank, the clerk, upon having his salary raised, undertook to become liable for one-fourth of the discounts. Held, the surety was not liable for anything occurring after the change in the terms of the clerk's employment.[3] A being collector of taxes, by writing under seal, appointed B his deputy for eight townships, naming them. B gave bond, with C as surety, which recited B's appointment for the eight townships, and provided that B should "continue truly and faithfully to discharge the duties of said appointment, according to law." Afterwards, by agreement between A and B, the paper of appointment was changed, and the name of another township interlined, so that the appointment was then for nine instead of eight townships. Held, C was not liable for any of the money collected by B after the change of the appointment.[4]

§ 343. **When surety discharged if responsibility of the prin-**

[1] Bank of Upper Canada *v.* Covert, 5 Up. Can. K. B. R. (O. S.) 541.

[2] Boston Hat Manufactory *v.* Messinger, 2 Pick. 223.

[3] Bonar *v.* Macdonald, 3 House of Lords Cases, 226.

[4] Miller *v.* Stewart, 9 Wheaton, 680; Miller *v.* Stewart, 4 Washington (C. C.) 26.

cipal varied.—The sureties of an assistant overseer of a parish, are no longer held on their bond for his conduct, if he accepts of a new appointment in lieu of the old one, at a different compensation, and which is incompatible with the first appointment.[1] It has been held that the sureties in a cashier's bond, in which they undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from losses arising from his frauds, inattention or negligence in the performance of his duties, are exonerated by a subsequent increase of the capital stock of the bank, after the additional capital has been paid in. The court said: "It is an established rule of law, that a party to a contract like that of these defendants shall not be bound beyond the extent of the engagement which appears from the terms of the contract and the nature of the transaction, to have been in his contemplation at the time of entering into it, and that his liability cannot without his consent be extended or enlarged, either by the obligee or by operation of law."[2] The bond of an agent of a life insurance company was conditioned for the faithful performance by him of all the duties of his appointment, as the same should be prescribed by the board of directors, and that he should account for such money as should come to his hands by virtue of his office. The company in connection with its business, engaged in banking, which by its charter it had no right to do, and the agent received money in the banking branch of the business and made default. Held, the surety on the bond was not liable for such default. The surety had a right to suppose that nothing would be done which the charter did not permit.[3] The chief clerk at a railway station, gave bond with surety, conditioned for his good behavior. Afterwards, by act of parliament, other lines were added under the management of the company, to which the clerk was bound to account. Held, the duties of the clerk were not changed and the sureties remained liable.[4] A bond to a railroad company recited that the principal had been "appointed by the said company, as ticket and freight agent at Ellicott's Mills," and was conditioned for the faithful performance of the duties of said office so long as he should hold

[1] Malling Union *v.* Graham, Law Rep. 5 Com. Pl. 201.

[2] Grocer's Bank *v.* Kingman, 16 Gray, 473, per Metcalf, J. *Contra*, see Morris' Canal & Banking Co. *v.* Van Vorsts' Admx. 1 Zab. (N. J.) 100.

[3] Blair *v.* Perpet. Ins. Co. 10 Mo. 559.

[4] Railway Co. *v.* Goodwin, 3 Wels. Hurl. & Gor. 320.

the same. At that time Ellicott's Mills was a second-class station, but the company subsequently made it a first-class station. At first-class stations a greater rate for freight was paid than at second-class ones, but the duties of the ticket and freight agent were the same at both. Held, the surety in the bond was not discharged.[1]

§ 344. **Discharge of surety of cashier, of surety on distiller's bond, and of surety when obligees subsequently become incorporated.**—Fifteen years before a bank charter would have expired by limitation, a cashier was appointed and gave a general bond for his good behavior. Afterwards, and before the time limited for the expiration of the charter, it was extended by act of the legislature for twenty years. The cashier continued to act as such, and was guilty of a default after the charter would have expired if the extension had not been granted. Held, the sureties were liable for such default.[2] A bank cashier gave a bond, conditioned that he would "well and truly perform the duties of cashier." The bank was guilty of a default, by which its charter became null and void, and the bank dissolved, but the legislature afterwards revived and continued the charter in force, as if no forfeiture had taken place. Held, the sureties were not liable for any act of the cashier after the forfeiture of the charter. They may have contemplated that such forfeiture would take place when they became bound.[3] The cashier of a branch bank was, by vote of the directors of the parent bank suspended, and notice to that effect was sent to the president of the branch bank, and received by him two days afterwards, and he notified the cashier thereof the next day. Held, the sureties of the cashier were liable for his acts until the time he was notified of his suspension.[4] An insurance agent having given bond for the performance of his duties as such, subsequently resigned his agency in writing, and it was accepted in writing, but he continued to be employed by the insurance company. Held, the sureties on the bond were not liable for any default of the agent happening after his resignation.[5] A bond was given by principal and surety to twelve persons and their successors, as governors of the

[1] Strawbridge v. The Baltimore & Ohio R. R. Co. 14 Md. 360.

[2] Exeter Bank v. Rogers, 7 New Hamp. 21.

[3] Bank of Washington v. Barrington, 2 Pen. & Watts (Pa.) 27.

[4] McGill v. Bank of U. S. 12 Wheaton, 511; Bank of U. S. v. Magill, 1 Paine, 661.

[5] Amicable Mutual Life Ins. Co. v. Sedgwick, 110 Mass. 163.

society of musicians, conditioned that the principal should account with them and their successors, governors, etc., as their collectors. Afterwards the society was incorporated, and it was held that the surety was not liable for any default of the principal, occurring after the incorporation.[1] A distiller's bond to the United States, which followed the notice as to the place where a distillery was to be carried on, and recited that it was to be carried on "at the corner of Hudson street and East Avenue," does not bind the sureties for business carried on "at the corner of Hudson and Third streets," in the same town, even though the principal had no distillery at the first named place, and the two places were only about four blocks apart. The United States had a lien on the land, upon which the distillery was situated, and the sureties might have been willing to be responsible for a distillery at one place and not at another.[2] It has been held to be no defense to the sureties on a distiller's bond, that after they became bound, and without notice to them, the capacity of the distillery was declared to be greater than when they became bound.[3]

§ 345. **Dealing by creditor with principal, which amounts to a departure from the contract, discharges surety.**—Any dealings with the principal by the creditor, which amount to a departure from the contract by which the surety is bound, and which by possibility might materially vary or enlarge the latter's liabilities without his consent, generally operate to discharge the surety. Thus, three notes were indorsed by sureties, and the principal at the same time executed to the payee a chattel mortgage, by the terms of which the mortgaged property was to be sold only on default of the principal in paying the notes at maturity. The first note coming due and being dishonored, by consent of all parties, a new one was substituted in its place. After the maturity of the dishonored note, but before the new one or any of the others came due, the creditor, with the assent of the principal, sold the property and applied the proceeds to pay the substituted note and the note next due. Held, the sureties were discharged by the sale of the property.[4] If at the time a surety becomes liable for a debt, the principal without his knowledge gives the

[1] Dance v. Girdler, 4 Bos. & Pul. 34.

[2] United States v. Boecker, 21 Wallace, 652.

[3] United States v. Woodman, 1 Utah, 265.

[4] Mayhew v. Boyd, 5 Md. 102.

creditor a separate agreement to pay a high rate of interest, it has been held that this discharges the surety.[1] A surety for the completion of work to be performed by the principal, where, by the terms of the contract, the principal is to be paid by instalments, is discharged if the principal is paid faster than the contract provides. The surety is thereby deprived of the inducement which the principal would have to perform the contract in due time. "There must be an assent by the surety to the creditor's dealing with the principal debtor otherwise than in the manner pointed out by the contract; and it is no answer to say that it is for the advantage of the surety, or that he has sustained no prejudice."[2] Where a surety entered into a bond, conditioned that his principal should insure, and keep insured, certain buildings on land mortgaged by him to the creditor, and afterwards the positions of the buildings were altered by the obligee, the out-buildings being brought nearer to the house, and the risk thus increased, it was held that the surety was thereby discharged.[3] A having purchased 3,000 shares of stock, B executed a guaranty to save A harmless from any loss on the purchase occurring within thirty days, and this guaranty was renewed from time to time. A purchased other large amounts of the same stock and mixed the 3,000 shares therewith till their identity was lost, and made sales of stock from time to time. The transactions resulted in a loss, and it was held that A, having rendered it impossible to ascertain whether there was a loss on the 3,000 shares, could not recover anything from B on the guaranty.[4] A principal debtor placed in the hands of his creditor certain claims against third parties, to be collected and applied to the payment of his debts. There was a surety for such part of the debt of the principal as might remain after the claims placed in the hands of the creditor had been collected and applied to the payment of the debts. If the claims had been collected in full, they would have paid the debt of the principal. The creditor compounded the claims for less than the amount due on them, and there was no evidence whether the claims were good or bad: Held, the

[1] Shaver *v.* Allison, 11 Grant's Ch. R. 355; *contra*, Coats *v.* McKee, 26 Ind. 223.

[2] General Steam Navigation Co. *v.* Rolt, 6 J. Scott (N. S.) 550, per Crowder & Willes, JJ. To same effect, see Calvert *v.* London Dock Co. 2 Keen, 638; Bragg *v.* Shain, 49 Cal. 131.

[3] Grieve *v.* Smith, 23 Up. Can. Q. B. R. 23.

[4] Strong *v.* Lyon, 63 New York, 172.

surety was discharged, but the court declined to say what would have been the law if it had been proved that money was made by the compromise.[1] A guaranty to be accountable for a certain amount to be advanced to the principal, does not bind the guarantor where, without his consent, it is delivered to a creditor of the principal in payment of a less sum then due from the principal to such creditor, and such creditor advances the principal a sum which, together with the debt, equals the sum authorized by the guaranty.[2] A became surety on a promissory note due on demand to secure a floating balance due, or to become due, a bank from B. Afterwards the bank, with the consent of B, credited him with the amount of the note: Held, the note had been diverted from the purpose for which it was given, and the surety was thereby discharged.[3] If a surety agrees to make good the deficiency arising from a sale of goods at a given place, which are consigned to the correspondent of the person to whom the security is given, who has the whole control of the venture, a sale by the consignee at another place releases the surety.[4]

§ 346. **Surety for alimony discharged if alimony changed by court—When changing part of contract does not release surety.**—A divorced husband was adjudged to pay his former wife a certain sum, at stated periods, as alimony, and gave a bond with surety for such payment. Afterwards, on the wife's petition, and without the consent of the husband or surety, the decree was

[1] American Bank *v.* Baker, 4 Met. (Mass.) 164.

[2] Wright *v.* Johnson, 8 Wend. 512.

[3] Archer *v.* Hudson, 7 Beavan, 551.

[4] Ludlow *v.* Simond, 2 Caines' Cases in Error, 1. A surety who agrees to become liable for a debt due on a certain day, is not liable if a shorter credit is given, Walrath *v.* Thompson, 6 Hill, 540. A surety for the acts of a firm is not liable for the acts of one partner after the other is dead, Connecticut Mut. Life Ins. Co. *v.* Bowler, 1 Holmes, 263. A surety for the losses of a partnership which is to continue five years, is entirely discharged if the partnership is carried on a year longer than the stipulated time, Small *v.* Currie, 5 De Gex, Macn. & Gor. 141. An agreement to guaranty a bill for a sum certain does not bind the guarantor for anything if a bill is taken for a greater sum, Phillips *v.* Astling, 2 Taunt. 206. A letter of credit which authorizes the drawing of bills at sixty days, will not render the signers liable for bills drawn at ninety days, Brickhead *v.* Brown, 5 Hill (N. Y.) 634; Brickhead *v.* Brown, 2 Denio, 375. "Suretee of the peace is discharged by the death of the King, for 'tis to observe the peace of that King, and when he is dead 'tis not his peace." Anon. Brookes' New Cas. 172. Holding that novation is never presumed, but must clearly result from the agreement of the parties, see Gillet *v.* Rachal, 9 Robinson (La.) 276.

CHAPTER XVI.

OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY MISREPRESENTATION, CONCEALMENT, FRAUD, OR NON-COMPLIANCE WITH THE TERMS UPON WHICH HE BECAME BOUND.

§ 348. **Surety discharged if creditor misrepresent the transaction to him.**—If any material part of the transaction between the creditor and his debtor, is by the creditor, or with his knowledge or consent, misrepresented to the surety, the misrepresenta-

tion being such that but for the same having been made, either the suretyship would not have been entered into at all, or being entered into, the extent of the surety's liability might be thereby increased, the surety is in such case generally held to be not bound by his obligation.[1] Thus, a forthcoming bond recited that the property had been levied on and appraised according to law, when it had not, in fact, been appraised according to law. This was known to the creditor, but not to the surety, and it was held it was a sufficient fraud on the surety to avoid the bond as to him.[2] A retiring partner, in order to induce a surety to indemnify him against the partnership debts, represented to him that they did not amount to over $500, when they were in fact $1,500, and it was held the surety was not bound.[3] It has been held that a guarantor that a note "is good" may show as a defense that the creditor misrepresented the legal effect of the words to him, upon the principle that if one of the parties to a contract is ignorant of a matter of law involved therein, and the other knows him to be so, and takes advantage of the circumstance, he is guilty of a fraud, against which the court will relieve.[4] A party having a mill for sale, made false representations concerning the same to the purchaser and his surety, upon which they relied. Held, the falsity of the representations were a good defense to the surety, even though the purchaser had not rescinded the contract. The principal was less able to perform his contract by reason of the falsity of the representations, and the surety was thereby discharged.[5] If a surety is induced to execute a bond, upon a false representation by the obligee that the principal is not indebted to him, the surety is not bound.[6] A covenanted to convey to B certain property free from incumbrances, except such as were set forth in a schedule, in consideration of B and C, a surety, doing certain things. It turned out that the property was charged with another incumbrance which A had forgotten, and of the existence of which C had no knowledge, and it was held that C was not bound.[7] A note being due, the creditor refused to extend the time of payment, but said that if a certain

[1] Municipal Council of Middlesex *v.* Peters, 9 Up. Can. C. P. R. 205.

[2] Frisch *v.* Miller, 5 Pa. St. 310. See, also, State *v.* Dunn, 11 La. An. 549.

[3] Fishburn *v.* Jones, 37 Ind. 119.

[4] Cooke *v.* Nathan, 16 Barb. (N. Y.) 342.

[5] Mendelson *v.* Stout, 5 Jones & Spen. (N.Y.) 408.

[6] Blest *v.* Brown, 3 Giffard, 450.

[7] Willis *v.* Willis, 17 Simons, 218.

person would, as surety, indorse, and the principals would sign a new note, payable to a bank, he would also indorse it and get the money from the bank, and the extension would thus be procured. Such a note was so signed and indorsed, but the creditor did not indorse nor negotiate it, but sued it himself, the above being merely a scheme to get the surety to become liable. Held, the surety was not liable.[1] Where one is induced to sign a note as surety, by the representation of the creditor that the note is to be used in payment for goods to be furnished by the creditor to the principal, and the note is used to pay a pre-existing debt of the principal to the creditor, the person so signing is not bound as surety.[2] A creditor represented to a surety that he was about to make an advance of 300*l.* in cash to a debtor, to enable him to satisfy a creditor who was pressing for payment, when in fact he was the creditor who desired payment, and credited most of the sum to the principal. Held, the surety was not discharged, because the misrepresentation did not amount to a fraud on him.[3] Certain corn factors supplied flour on credit to a baker, upon his executing to them, with surety, a bond, the condition of which, after reciting that the baker had entered into a contract for the supply of bread to the army, was that the bond should be void if the baker should deliver to the corn factor his bills on the government as he drew them, and if he and the surety should make good the amounts to become due the corn factors. The corn factors supplied flour, but not of the quality specified in the government contract, which was vacated on that account. Held, the corn factors could not, as against the surety, allege ignorance of the terms of the contract, and that the surety was discharged. The contract being referred to in the bond, it was the same as if the corn factors had represented to the surety that they would supply such flour as the contract called for.[4]

§ 349. **When surety discharged if condition that another shall sign is not complied with.**—If the surety signs the obligation upon the condition that another shall also sign it as surety before it shall be binding on him, and this condition is agreed to by the creditor, or is known to him when he takes the obligation, the surety is not generally liable unless the condition is complied

[1] Armstrong *v* Cook, 30 Ind. 22.

[2] Ham *v*. Greve, 34 Ind. 18.

[3] Pledge *v*. Buss, Johnson (Eng. Ch.) 663.

[4] Blest *v*. Brown, 4 De Gex, Fish & Jones, 367.

with.[1] But where a principal was induced to sign a note by the false representation of the payee, that he would get a certain party to sign it as surety, it was held that this was no defense for the principal, because the principal would in no event have a right to look to the surety for contribution, and his liability was not altered by the fact that no surety was obtained.[2] The officers authorized to accept a sheriff's bond, agreed to accept certain parties who signed it, and one H, as sureties. Those who signed executed the bond in blank, and gave it to the sheriff to get the signature of H, but H did not sign it, and it was delivered and accepted without his signature. It did not appear that the sureties told the officers that they would not be bound unless H signed, but simply that the officers agreed to accept them and H. Held, the sureties were liable on the bond.[3]

§ 350. **If the condition upon which the surety signs is not complied with, he is not bound.**—It is a general rule, that if the condition, known to the creditor, upon which the surety agrees to become bound, is not complied with, the surety is discharged. Where a creditor had obtained judgment against the principal and issued execution thereon, and certain sureties were induced to sign a note for the amount, by the promise of the creditor that he would assign the execution to them, and he did not assign it, but brought suit on the note, it was held the sureties

[1] Cowan *v.* Baird, 77 Nor. Car. 201; Clements *v.* Cassilly, 4 La. An. 380; Crawford *v.* Foster, 6 Ga. 202; Miller *v.* Stem, 12 Pa. St. 383; Hill v. Sweetser, 5 New Hamp. 168; United States *v.* Hammond, 4 Bissell, 283; Read *v.* McLemore, 34 Miss. 110; King *v.* Smith, 2 Leigh (Va.) 157; Smith *v.* Doak, 3 Texas, 215; Dunn *v.* Smith, 12 Smedes & Mar. (Miss.) 602; Goff *v.* Bankston, 35 Miss. 518; Jordin *v.* Loftin, 13 Ala. 547; Bivins *v.* Helsey, 4 Met. (Ky.) 78; Evans *v.* Bremridge, 2 Kay & Johns. 174; Evans *v.* Bremridge, 8 De Gex, Macn. & Gor. 100; Coffman *v.* Wilson, 2 Met. (Ky.) 542; Corporation of Huron *v.* Armstrong, 27 Up. Can. Q. B. R. 533; *contra*, Moss *v.* Riddle, 5 Cranch, 351. In Hubble *v.* Murphy, 1 Duvall (Ky.) 278, and in Murphy *v.* Hubble, 2 Duvall (Ky.) 247, it was held that where a note was signed and left with the payee, upon condition that it should not be valid unless another signed it as surety, the surety was bound, notwithstanding the condition was not complied with; on the ground that evidence of such an agreement contradicted the note, and that an obligation could not be delivered to the obligee as an escrow. But where there was such an agreement, and the bond was not to be delivered to the obligee till another had signed as surety, the same court held that the surety was not liable unless such other surety signed; Garvin *v.* Mobley, 1 Bush (Ky.) 48.

[2] Beesley *v.* Hamilton, 50 Ill. 88.

[3] Police Jury *v.* Haw. 1 La. (Miller) 41.

were discharged.[1] A and B agreed, that B should make and deliver to A certain quantities of brick, for which $500 were to be paid by A to B on a certain day, as a condition precedent to the delivery of the brick, and C became surety that B would perform his contract. A by B's consent failed to pay the $500 at the day specified, but afterwards paid it to B, who accepted it. Held, the surety was discharged.[2] A guaranties to B the debt of C, upon condition "that no application shall be made to A on B's part, for the amount guarantied or any portion thereof, but on the failure of B's utmost efforts and legal proceedings to obtain the same from C." No proceedings were had against C till four years after the guaranty was given, and it was held the guarantor was discharged.[3] A and B entered into covenants to be performed by each, by which A contracted to purchase and deliver to B one thousand sheep, which B agreed to receive and pay for at a certain price. The contract, which was within the statute of frauds, was signed by A and by two others as his sureties, but not by B, and it was held the sureties were discharged.[4] A purchased land from B and gave a bond for part of the purchase money, with C as surety, and also gave B a mortgage on the land to secure the payment of the bond. Before C signed, B impressed him with the idea, if he did not tell him, that the sum for which he became surety, would be paid by the cutting and selling of timber from the land. A commenced to cut timber from the land, and B procured an injunction against his so doing. Held, the surety was thereby discharged.[5] A agreed to become surety for B in a joint and several bond to C, and B was to give a counter bond of indemnity to A. The bond to C was executed by A only, but B executed the counter bond to A. Held, A was released, as he had only agreed to become bound in a bond which B also should execute.[6] But it has been held, that a surety who executed a bond on the faith of its being executed by the principal, also, cannot be released from his obligation on the ground

[1] Jones v. Keer, 30 Ga. 93.

[2] Cunningham v. Wrenn, 23 Ill. 64.

[3] Holl v. Hadley, 4 Nevile & Man. 515. Holding that a surety is discharged where creditor fails to perform his agreement that he will, within three years, enforce payment of a note due on demand, see Lawrence v. Walmsley, 12 J. Scott (N. S.) 799; see, also, on this subject, Sheldon v. Reynolds, 14 La. An. 703.

[4] Swope v. Forney, 17 Ind. 385.

[5] Lynch v. Colegate, 2 Harr. & Johns. (Md.) 34.

[6] Bonser v. Cox, 4 Beavan, 379.

that the principal has never executed it, if the principal has executed another instrument concerning the same matter, on which the surety (having paid and been subrogated to the same) may sue him and rank as a specialty creditor.[1] A creditor, who obtains a guaranty upon the representation that he is accepting a composition from his debtor, when in fact he is being paid in full, cannot, on grounds of public policy, hold the guarantor.[2] A composition agreement, signed by certain creditors, contained a condition that it should not be binding, unless it was signed by all the creditors. Composition notes were, under the agreement, delivered to the plaintiff, indorsed by the defendant as surety. The agreement was not signed by all the creditors, but that fact was not known to the defendant when he signed the notes. Held, the agreement and the notes were a part of one transaction, and the surety was not liable on his indorsement.[3]

§ 351. **Misrepresentation of unexecuted intention, does not discharge surety.**—A distinction has been taken between a misrepresentation of an existing fact, and of an unexecuted intention, and the latter has been held not to be such a fraud as will discharge a surety. A retiring partner represented to a surety that if he would become responsible to him for the payment of the partnership debts, he would forever retire from the business, and in no manner compete with the surety and the remaining partner, who were going into the same business; but immediately after the surety became bound, the retiring partner entered into the same business. Relying upon the above distinction, the court held the surety bound, notwithstanding the representations were made for the purpose of deceiving the surety.[4] Where a guaranty was for the honesty of a tax collector, and the misrepresentation relied upon to discharge the guarantor, was that the collector's accounts would be examined every week, and such had been the course

[1] Cooper v. Evans, Law Rep. 4 Eq. Cas. 45.

[2] Clark v. Ritchie, 11 Grant's Ch. R. 499; to similar effect, Pendlebury v. Walker, 4 Younge & Coll. (Exch.) 424.

[3] Doughty v. Savage, 28 Ct. 146. To contrary effect, see Whittemore v. Obear, 58 Mo. 280. Holding a surety not bound when the obligation signed by him is delivered on terms different from those stipulated by him, see Lovett v. Adams, 3 Wend. 380. Holding surety estopped under certain circumstances from setting up that the bond was delivered contrary to the agreed condition, see Haman v. Howe, 27 Gratt. (Va.) 676.

[4] Gage v. Lewis, 68 Ill. 604. Recognizing the same distinction, see Municipal Council of Middlesex v. Peters, 9 Up. Can. C. P. R. 205.

pursued, and it was expected it would be, but there was a failure in that regard, the above distinction was recognized, and the guarantor held liable.[1] An application for a policy of guaranty for the acts of the secretary of a literary institution, contained the following interrogatory and answer: State "the checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?" Answer: "Examined by finance committee every fortnight." A loss was occasioned by neglect to examine the accounts in the manner stated. Held, the sureties were nevertheless liable. The court said, that in view of all the circumstances, the answer was not expected to be on the part of the guarantor or expected to be on the part of the person to whom the guaranty was given, "anything more than a declaration of the course intended to be pursued; and if the answer was made *bona fide* and honestly," the guarantor was not discharged.[2]

§ 352. **When parol evidence competent to show terms upon which surety signed.**—Parol evidence of what took place at or before the time a written instrument, complete in itself, was signed will, it seems, be received to control the operation of the provisions of the instrument when there was fraud in obtaining it, when a fraudulent use is sought to be made of it, and when application is made to a court of equity to enforce such instrument, in which case the adverse party is allowed to show by parol evidence that the instrument does not contain the true agreement of the parties, or the whole of it.[3] A surety may generally show by parol evidence the consideration upon which he signed the obligation, and that such consideration has failed, without contravening the rule that parol contemporaneous evidence will not be received to affect the operation of a written instrument. Thus, at the time a surety executed a note for $300 to the creditor, he was already surety on another note for the principal for $233, payable to a third person, and the creditor, in consideration that he would sign the $300

[1] Towle *v.* National Guardian Assurance Society, 3 Giffard, 42.

[2] Benham *v.* Assurance Co. 7 Wels. Hurl. & Gor. 744, per Pollock, C. B.

[3] Dwight *v.* Pomeroy, 17 Mass. 308; Phyfe *v.* Wardell, 2 Edwards Ch. 47; Tyson *v.* Passmore, 2 Pa. St. 122; Taylor *v.* Gilman, 25 Vt. 411; Oliver *v.* Oliver, 4 Rawle (Pa.) 141; Coger's Exrs. *v.* McGee, 2 Bibb (Ky.) 321; Snyder *v.* Klose, 19 Pa. St. 235; Wood *v.* Dwarris, 11 Exch. 493; Cathcart *v.* Robinson, 5 Peters, 264; Best *v.* Stow, 2 Sandf. Ch. 298.

note, verbally promised to procure his release from the note for $233, which he failed to do. Held, this agreement might be shown by parol evidence, and that the surety was discharged. The court said: "We perceive no valid reason why the engagement of the surety, who as such executes a written contract, may not be founded upon a consideration variant from that which induced its execution by the principal. And if, as in the case at bar, such consideration be a condition subsequent, to be performed by the creditor, his failure to perform it would evidently operate as a fraud upon the surety, and upon that ground release him from all liability upon his engagement. * And it is plainly competent for the surety to set up and prove such failure of consideration, because it has often been adjudged that such defense is not in conflict with the legal effect of the contract."[1] In consideration that a surety would sign a note, the creditor at that time verbally promised him that the note should be secured by a chattel mortgage, which secured an old note. The creditor afterwards released the chattel mortgage, and it was held that the parol agreement might be shown, and that the surety was discharged. The court said: "It was competent for the parties to make the contract alleged, and if it formed the only consideration for the making of the note by the * (surety), parol evidence is admissible to prove that fact, and also that the consideration has failed when the action is by a holder with notice. Such evidence is no infringement of the rule before referred to, excluding parol evidence to vary or contradict a written contract."[2] It has been held that the indorser of a note may prove by parol that he indorsed it merely as surety, and that the agreement, when he indorsed it, was that it was to be paid out of claims in his hands due the principals. In such a case, the court said: "The evidence offered was neither to contradict nor to explain a written instrument, but to prove a collateral fact or agreement in relation to it."[3] The payee of a promissory note verbally promised the surety, as

[1] Campbell v. Gates, 17 Ind. 126, per Davison, J.

[2] Post v. Robbins, 35 Iowa, 208, per Miller, J.

[3] Dwight v. Linton, 3 Robinson (La.) 57, per Morphy, J. For other cases, holding parol evidence of the agreement upon which the surety signed, competent, see Matheson v. Jones, 30 Ga. 306; Thomas v. Turscott, 53 Barb. (N.Y.) 200; Stewart v. Davis' Exr. 18 Ind. 74; Briggs v. Law, 4 Johns. Ch. 22; Watts v. Shuttleworth, 5 Hurl. & Nor. 235. Holding that such evidence must be clear, see Tiffany v. Crawford, 1 McCarter (N. J.) 278.

an inducement for him to sign it, that as soon as the note became due, he would immediately proceed to collect it from the principal. The note became due and remained so a year, and the creditor neither sued the principal nor notified the surety, and the principal became insolvent. Held, the surety was discharged. The court said that the creditor, by his assurances to the surety, "has lulled him into a false security, has induced him to omit to do what he would otherwise have done, viz.: pay the debt and secure himself by attaching * (the principal's) property, or otherwise obtaining security, and has thus subjected him to the loss of the whole debt." He is equitably estopped to claim anything from the surety.[1] But where a surety signed a note in consideration of a parol contemporaneous agreement by the payee, that he would continue the principal in his employ till he could, by his earnings, pay the note, it was held that the surety could not show a breach of this agreement as a defense to the note, on the ground that the verbal agreement varied the legal effect of the note.[2] In an action against a surety on a lease, it has been held not competent for him to show a verbal agreement contemporaneous with the execution of the lease, that it might be surrendered at the will of the tenant, for this would be to change a lease for a definite time into one at will.[3]

§ 353. **Surety not discharged by fraud of principal, unless creditor have notice.**—If the principal, by fraud, induces the surety to become bound, but the obligee has no notice thereof, such fraud will, as a general rule, be no defense to the surety.[4] Where the principal represented to the surety that he could and would use the money to be obtained on a note profitably in a business operation, and the principal delivered the note to the payee in payment of an existing debt, the payee having no knowledge of the representations made to the surety, it was held that the surety

[1] Hickok v. Farmers & Mechanics Bank, 35 Vt. 476, per Aldis, J. Holding that parol evidence of a contemporaneous agreement to diligently prosecute the principal in a note cannot be given, see Huey v. Pinney, 5 Minn. 310; First Natl. Bank, Monmouth v. Whitman, 66 Ill. 331; Thompson v. Hall, 45 Barb. (N. Y.) 214.

[2] Tucker v. Talbott, 15 Ind. 114.

[3] Brady v. Peiper, 1 Hilton (N. Y.) 61. To similar effect, see Brush v. Raney, 34 Ind. 416; Weare v. Sawyer, 44 New Hamp. 198.

[4] Coleman v. Bean, 1 Abbott's Rep. Om. Cas. (N. Y.) 394; Graves v. Tucker, 10 Smedes & Mar. (Miss.) 9; Ladd v. Board of Trustees, 80 Ill. 233; Griffith v. Reynolds, 4 Gratt. (Va.) 46; Western N. Y. Life Ins. Co. v. Clinton, 66 New York, 326.

could not avail himself, as a defense, of the fraud practiced upon him by the principal.[1] Where certain parties were led to execute an administration bond as sureties by the misrepresentation of others, it was held to be no defense as against one who was in no way connected with the deception.[2] A being about to purchase a medical practice from B, told him he could get C to be his surety for 300*l.*, and A finally purchased the practice, and gave B his and C's bond for 300*l.*, and gave B his individual bond for 125*l.* additional. C did not know of the giving of the latter bond, but supposed the practice was sold for 300*l.*: Held, if A alone practiced the deception on C it did not discharge him, but if B participated in the misrepresentation, the bond was void.[3]

§ 354. **Surety on note not discharged if creditor have no notice of condition on which he signed.**—If a surety executes a negotiable promissory note, and leaves it with the principal, upon condition that the principal shall get another to sign it before it is delivered, and the principal delivers it to the payee without complying with the condition, and the payee takes it without any notice of such condition, express or implied, the surety cannot avail himself of such condition, and is liable on the note.[4] The same rule holds good with reference to any other condition upon which a surety signs such note, and of which a *bona fide* holder has no notice. Thus, where a note was indorsed by a surety for the purpose of paying another note on which the indorser was liable, it was held to be no defense against a bona fide holder without notice that the principal had misapplied the proceeds of the note.[5] The same thing was held, where the guarantor of a note became liable upon the understanding that the note should be discounted at a particular bank, but the holder had no notice of that fact when he took the note.[6]

[1] Quinn *v.* Hard, 43 Vt. 375. In Riley *v.* Johnson, 8 Ohio, 526, precisely the opposite was held, on the ground that the payee having taken the note for a precedent debt, was not a *bona fide* holder.

[2] Casoni *v.* Jerome, 58 New York, 315.

[3] Spencer *v.* Handley, 5 Scott (N. R.) 546.

[4] Deardorff *v.* Foreman, 24 Ind. 481; Merriam *v.* Rockwood, 47 New Hamp. 81; Deardorff *v.* Forseman, 24 Ind. 481; Passumpsic Bank *v.* Goss, 31 Vt. 315; Smith *v.* Moberly. 10 B. Mon. (Ky.) 266; Dixon *v.* Dixon, 31 Vt. 450; Ferrell *v.* Hunter, 21 Mo. 436; Findley *v.* State Bank, 6 Ala. 244. *Contra*, where the note was non-negotiable, see Ayres *v.* Milory, 53 Mo. 516.

[5] Stoddard *v.* Kimball, 4 Cush. 604; Stoddard *v.* Kimball, 6 Cush. 469.

[6] Sweetser *v.* French, 2 Cush. 309.

Where a surety signed a note only on condition that the principal should indemnify him by mortgage before the note should be delivered, and it was not done, it was held that this was no defense against a *bona fide* holder without notice, notwithstanding the fact that the note was payable to A or bearer, and was sold to B.[1] Where the payee of a promissory note filled it up and gave it to the principal to obtain the name of a surety thereon, and the principal applied to a person who could not read or write, and asked him to sign the note as surety, stating to him that it was for a smaller sum than that expressed in the note, and he thereupon authorized the principal to sign his name to the note, without asking that it be read, and the note was then delivered to the payee, who had no notice of the fraud, it was held the surety was liable.[2] Where a principal falsely represented to a surety that the creditor would take a note for one half the debt in full payment thereof, and the surety signed such a note, and it was delivered to the creditor, who did not know of the misrepresentation, it was held, the surety was liable.[3] A was principal and B and C sureties in a note. The creditor agreed to extend the time if A would get D to sign the note in place of B. A took the note to D, and falsely represented to him that C had agreed to remain on the note if D would sign it in place of B. The name of B was then stricken out, and D signed the note, relying on these representations. Held, C was discharged, and A and D were bound. A was not the agent of the creditor, and if D relied upon his representations, he must suffer by it.[4]

§ 355. **When surety on bond liable, if condition that another shall sign is not complied with.**—A bond, perfect on its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution, and also, that he has

[1] Gage *v.* Sharp, 24 Iowa, 15.
[2] Craig *v.* Hobbs, 44 Ind. 363.
[3] Booth *v.* Storrs, 75 Ill. 438.
[4] Farmers & Traders Bank *v.* Lucas, 26 Ohio St. 385.

been induced, upon the faith of such bond, to act to his own prejudice.[1] The reason for this course of decision has been thus well expressed: "The principal obligor, naturally the chief actor, presents * (the bond) for the acceptance of the obligee; the instrument is in the regular course of delivery; the appearance which the signers of it have created by their acts, is that of an absolute authority in the principal obligor to deliver the instrument as, and for what, it purports on its face to be, the deed of those who have affixed their names and seals to it. * We regard the case as one where the surety must run the risk of the fraud of his own agent. We deem it the duty of the signer of an instrument under such circumstances, to see to it that the authority he has delegated is not abused, and that it is not just nor reasonable to allow him to take advantage of its abuse to defeat his obligation."[2]

§ 356. **When surety, who signs instrument in blank, bound by act of principal in filling blank.**—A surety who signs a blank instrument, and entrusts it to his principal, is generally bound to one who takes it without notice, for anything with which the principal may fill the blank. Thus, a party signed a blank appeal bond, with the understanding that it should only be filled up so as to cover the costs of the appeal, but without his knowledge it was filled up so as to cover the debt as well as the costs. Held, the surety was bound by the bond as it read, unless the obligee was cognizant of the fraud.[3] So, where certain sureties signed a note, blank as to date and amount, and delivered it to the principal, and he added seals to the names of the sureties and filled the blank with a much larger sum than he had agreed with the sure-

[1] State v. Pepper, 31 Ind. 76, overruling Pepper v. The State, 22 Ind. 399; Dair v. United States, 16 Wallace, 1; Webb v. Baird, 27 Ind. 368; Nash v. Fugate, 24 Gratt. (Va.) 202; State v. Garton 32 Ind. 1; York Co. M. F. Ins. Co. v. Brooks, 51 Me. 506; Hunt v. The State, 53 Ind. 321; Readfield v. Shaver, 50 Me. 36; Gwyn v. Patterson, 72 Nor. Car. 189; State v. Peck, 53 Me. 284; Graves v. Tucker, 10 Smedes & Mar. (Miss.) 9; Whitaker v. Crutcher, 5 Bush (Ky.) 621; State v. Potter, 63 Mo. 212; Millett v. Parker, 2 Met. (Ky.) 608; see, also, on this subject, Canal and Banking Co. v. Brown, 4 La. An. 545.

[2] Smith v. Peoria County, 59 Ill. 412, per Sheldon, J. Holding that notice that he will not be bound by a bond unless others sign it, given by a surety to the mayor of a city, who is also surety on the bond, will not avail the surety giving the notice; see Stevenson v. Bay City, 26 Mich. 44.

[3] Chalaron v. McFarlane, 5 La. (Curry) 227. To similar effect, see McCormick v. Bay City, 23 Mich. 457.

ties, and delivered it to the payee, who took it without notice, it was held the sureties were liable for the note, as the payee took it.[1] A blank note with $5,000 inserted at the top of the paper, and signed by a firm and two sureties, and by one of the firm placed in the hands of a factor as collateral security for acceptances of drafts to be drawn on him by the firm, and afterwards filled up in good faith by the factor, in accordance with his instructions, with the sum of $5,000, as agreed upon at the time the note was left with him, was held to be binding on the sureties thereon.[2] Where a surety by parol authorized the principal to fill certain blanks in a bond, and afterwards revoked the authority, and the principal afterwards filled the blanks in the obligee's presence, it was held the surety was not bound, even though the obligee did not know that the authority had been revoked.[3]

§ 357. **When name of surety in body of obligation is notice to obligee of condition that he should sign.**—If a surety signs an obligation, in the body of which another is also named as surety, upon condition that he shall not be bound unless such other also signs and delivers the bond to the principal, who delivers it to the obligee without complying with the condition, the surety is not usually bound. The fact that the instrument is not executed by all those named in it as obligors, is sufficient to put the obligee upon inquiry, and charge him with notice of the condition.[4] If the instrument in its body purports to be signed by the principal, but is not so signed, this is sufficient notice to the obligee that it is imperfect, and the sureties may show as a defense that they signed upon condition that the principal also should sign.[5] But it has been held that the mere fact that there is one more seal to an obligation than the number of names signed to it, is not sufficient to charge the obligee with notice

[1] Fullerton *v.* Sturges, 4 Ohio St. 529.

[2] Carson *v.* Hill, 1 McMullan Law (So. Car.) 76.

[3] Gourdin *v.* Read, 8 Richardson Law (So. Car.) 230.

[4] Ward *v.* Churn, 18 Gratt. (Va.) 801; Warfel *v.* Frantz, 76 Pa. St. 88; Pawling *v.* The United States, 4 Cranch, 219; Sharp *v.* The United States, 4 Watts (Pa.) 21; State Bank *v.* Evans, 3 J. S. Green (N. J. Law) 155. Holding that in such a case possession of the obligation is *prima facie* evidence that those who signed delivered it, see Grim *v.* School Directors, 51 Pa. St. 219. Holding that in such a case it was not, from the mere fact that one did not sign, to be implied that the bond was incomplete, and not binding on those who did sign it, see Keyser *v.* Keen, 17 Pa. St. 327.

[5] Wild Cat Branch *v.* Ball, 45 Ind. 213.

that another was to sign it.[1] The record of a county court recited that a sheriff elect and his sureties, naming them, came into court and executed the sheriff's bond. One of the sureties named was in court to sign the bond, but through inadvertence did not sign it. Held, none of the sureties were liable, as each had a right to suppose that all named in the order would sign, and that no other bond would be approved.[2] A bond in its body purported to be made by A, as principal, and B, C and D, as sureties, and was signed by all of them except C. The bond was signed by B on condition that he should not be bound unless C signed, but there was no such condition as to D: Held, that B was not bound because of the condition, and D was not bound because A was not. The court said: "The bond purports to be the joint bond of all the parties. The presumption from the face of it is that * (D) intended to be bound along with the other parties by whom it was executed, and not severally."[3] A forthcoming bond contained in its body the names of the principal and two sureties. The principal and one of the sureties named signed the bond in the presence of the sheriff, who was the obligee, and the bond was then and there delivered to the sheriff, who had no notice of any condition: Held, the surety could not sustain the defense that he agreed to become liable only on condition that the other named surety should sign. Having executed the bond in the presence of the obligee, and seen it delivered to him without saying anything, the law will hold that he intended to create an absolute obligation.[4] H as principal, and D as surety, executed a bond to secure the payment of rent. T was named in the bond as surety, but did not sign it. T was not present when the bond was executed, and D told the obligee that T could not then conveniently attend, but would sign at any time. T, on being applied to, refused to sign, and D knew of the refusal and made no objection: Held, D was liable on the bond, although the court said it might have been otherwise if D, upon the refusal of T, had notified the obligee that he was not willing to remain bound.[5]

[1] Simpson's Exr. v. Bovard, 74 Pa. St. 351.

[2] Fletcher v. Leight, 4 Bush (Ky.) 303.

[3] Ward v. Churn, 18 Gratt. (Va.) 801, per Joynes, J.

[4] Johnson v. Weatherwax, 9 Kansas, 75.

[5] Sidney Road Co. v. Holmes, 16 Up. Can. Q. B. R. 268.

§ 358. **When surety discharged because the signature of another surety is forged.**—When the name of one of several persons purporting to sign an instrument is forged, and sureties sign upon the supposition that such signature is genuine, the liability of the sureties in such case will depend upon circumstance. A surety signed a bond to which the name of another was then forged, supposing the forged signature was genuine. The forged signature was afterwards entirely erased, and the bond delivered to the obligee, who had no notice of the forgery or erasure. The court held the surety bound, and said that "It was his neglect that he was ignorant of the genuineness of the signatures which preceded his own. He imposed no condition limiting the legal effect of his signature.[1] * A subsequent surety is not to be discharged because the name of a prior one has been forged. His own signature is an implied assertion of the genuineness of those which preceded it, for it is not to be presumed that a man would affix his name to a bond when the prior names were forged."[2] So it has been held that a party who signs a note as surety, in effect affirms the genuineness of the preceding signatures, and cannot avoid liability by showing that they are forged, unless the creditor knew of the forgery when he took the note.[3] An agreement in writing to "guaranty the payment of a note signed by A and payable to B, and by him indorsed, and also indorsed by C and D," and further described by its amount, date and time, which agreement is made after a note is shown purporting to correspond with the description, and actually indorsed by C and D, but on which the names of A and B are forged, though this is not known to the guarantor nor the holder, binds the guarantor to pay that note, if there is no other note in circulation at the time of the guaranty answering the description. The court said: "The defendant guarantied the payment of this particular note, and thereupon the plaintiff concluded his agreement to purchase the note, both parties

[1] Holding that when a surety signed upon the express condition that another, whose name was forged to the bond, should also sign, the surety was not liable, even though the obligee had no notice of the condition, see Linn County *v.* Farris, 52 Mo. 75. Holding the surety liable where the obligee had no notice of the condition, see State *v.* Baker, 64 Mo. 167.

[2] York Co. M. F. Ins. Co. *v.* Brooks, 51 Me. 506, per Appleton, C. J. To similar effect, see Franklin Bank *v.* Stevens, 39 Me. 532.

[3] Selser *v.* Brock, 3 Ohio St. 302. Holding that a surety who signs after the forged name of another surety, is liable, if he did not rely on such forged signature as genuine, see The State *v.* Pepper, 31 Ind. 76.

being equally innocent as to any fraud, misrepresentation or concealment, the court are of opinion that upon the non-payment of the same at maturity by the parties whose names were borne thereon, the defendant under his guaranty became liable to pay the same to the plaintiff."[1] Where a surety signed a sheriff's bond in the presence of the county court, the bond then being in possession of the court, and the principal then represented to him that a certain person whose name appeared on the bond had signed it, when in fact such signature was a forgery, it was held the surety was not bound, on the ground that the bond being in the custody of the court, the surety had good reason to suppose that all the signatures were genuine.[2] In holding that a surety who signed the bond of a master in chancery, supposing that the forged signature of a preceding surety was genuine, was not liable, the court said: "By a fraud practiced upon the defendant by means of the commission of a high crime, he was made to assume a different and greater liability than he intended or supposed he was assuming when he executed the bond. * In this case he acted upon an apparent fact, which, without the commission of a great crime by others, must have been true, and the commission of this crime the highest degree of caution might not suggest, and he cannot be charged with even slight neglect in not having discovered the forgery."[3]

§ 359. **When failure of consideration to principal is a defense for surety.**—It has been held that the sureties on a note given for the price of a slave, may in a suit against them in which the principal is not joined, set up as a defense a breach of warranty of the soundness of the slave.[4] But it has been held that a surety for the purchase money of land cannot set up a defect or failure of title where the principal does not desire to avail himself thereof.[5] In a suit against a surety upon a note executed for land, sold at administrator's sale, the principal in the note being dead, and neither his administrator nor heirs being parties, it

[1] Veazie v. Willis, 6 Gray, 90, per Dewey, J.

[2] Chamberlin v. Brawer, 3 Bush (Ky.) 561.

[3] Seely v. The People, 27 Ill. 173, per Caton, C. J. See, also, Pepper v. The State, 22 Ind. 399.

[4] Scroggin v. Holland, 16 Mo. 419. The same thing was held in the case of a breach of warranty of a horse in Mitchum v. Richardson, 3 Strob. Law (So. Car.) 254.

[5] Ross v. Woodville, 4 Munf. (Va.) 324; Commissioner v. Exr. of Robinson, 1 Bailey Law (So. Car.) 151.

has been held the surety cannot set up the invalidity of the sale as a defense.[1] A party being about to buy a note signed by principal and surety, asked the principal if it was all right, and upon being answered that it was, purchased it. In a suit on the note against the surety, the principal being dead, it was held that the surety could not show that the note was without consideration. The principal would have been estopped to show that fact, and the surety stood in no better position.[2] M had been the cashier of the plaintiffs' branch bank, and had embezzled the funds thereof. To conceal the embezzlement, he bought from the plaintiff's the banking house and assets of the branch bank, the assets being described in the bill of sale, in accordance with the list of them furnished by M himself, which list was false, and comprised various bonds, bills and notes, that did not exist. M gave his notes for the price, with the defendants as sureties, they as well as the plaintiffs being ignorant of the fraud of M. Afterwards M absconded, and his sureties claimed they were not bound because they became sureties on a sale, and their principal had not received the consideration thereof, and to hold them liable would be to make them liable for the defalcation of M, and not for a purchase made by him. The court held the sureties liable, and said that M could not set up want of consideration to defeat the sale, and the sureties were in no better position.[3]

§ 360. **When surety not discharged by false representation of third person.**—A new bond having been demanded of a state treasurer, certain sureties before signing the same, inquired of the legislature and of the comptroller, and were falsely informed by each, that the treasurer had before conducted himself properly in office. Held, the legislature was the agent of the state in the premises, and its representations bound the state, but it was otherwise with reference to the comptroller.[4] It has been held that the cashier of a bank ordinarily has no authority to discharge its debtors without payment, nor to bind the bank by an agreement that a surety shall not be called upon, or that he will have no further trouble about the debt, but that if the cashier informs the

[1] Lathrop *v.* Masterson, 44 Texas, 527.

[2] Dillingham *v.* Jenkins, 7 Smedes & Mar. (Miss.) 479. To same effect, see McCabe *v.* Raney, 32 Ind. 309.

[3] Union Bank *v.* Beatty, 10 La. An. 378.

[4] Sooy *ads.* State, 38 New Jer. Law, 324; Sooy *ads.* State, 39 New Jer. Law 135.

surety that the debt is paid, and the surety relies upon the statement, and is prejudiced thereby, he is discharged, because a cashier has authority to receive payment of debts due the bank, and to give information concerning the same.[1] A party was properly arrested in a civil suit, and the sheriff falsely represented to him and to one who became his surety, that unless he gave a note with surety, he would have to go to jail, and no bail would be taken. The principal and surety, thereupon relying upon such false representations, signed the note to procure the principal's release, but the money for which the note was given was in fact due the party who caused the arrest. Held, the surety was liable. The misrepresentations were concerning matters of law, and it did not appear the sheriff was authorized by the creditor to make them.[2]

§ 361. **Miscellaneous cases holding surety discharged by non-compliance with the terms upon which he signed.**—The issuing of a writ of summons, although returned not served, is a suit brought, and will release the guarantor of a bond who has become bound in consideration of total forbearance.[3] A guarantor for goods to be sold on a credit of eighteen months, is not liable if the sale is made on a credit of twelve months, even though the creditor waits six months longer.[4] So where A hired a slave from B for one year, and executed his note to B, with C as surety, for the price agreed to be paid, and the slave, without just cause, voluntarily returned to B before the year was out, and worked for him the remainder of the time, and A and B agreed that the note should be credited with the value of the services for the time the slave did not work for A, it was held that C was entirely discharged.[5] A purchaser of land having given two notes with surety for the purchase money, and entered into possession of the land, afterwards brought a suit in chancery to rescind the sale on the ground of fraud, and the sale was rescinded, and a decree made against the purchaser for a certain amount for use and occupation, but it was held that there could be no decree against the surety for the use and occupation.[6] A being indebted to B in

[1] Bank v. Haskell, 51 N Hamp. 116.

[2] Reed v. Sidener, 32 Ind. 373. Holding sureties on forthcoming bond discharged by false representation of constable that the property had been legally levied on, see Bradley v. Kesee, 5 Cold. (Tenn.) 223.

[3] Caldwell v. Heitshu, 9 Watts & Serg. (Pa.) 51.

[4] Bacon v. Chesney, 1 Starkie, 192.

[5] Hawkins v. Humble, 5 Cold. (Tenn.) 531.

[6] Elliott v. Boaz, 13 Ala. 535.

more than 3,000*l.* agreed to take 1,500*l.* in full payment of the debt, and in consideration of this agreement, C gave B a note for 150*l.* in part payment of the 1,500*l.* Afterwards A became bankrupt and B proved his full claim of more than 3,000*l.* against A's estate. Held, C was thereby discharged.[1] The indorser of a promissory note protested for non-payment, signed an agreement reciting that the drawer was about making an arrangement with the holder for a renewal of the note, which was to be reduced from five to ten per cent. every sixty days, and consenting that the protested note should be held as collateral security, and that no advantage would be taken of any extension given. The holder received the agreement and extended the time without always exacting the stipulated reduction. Held, the indorser was thereby discharged.[2] A surety covenanted to pay certain advances made by the creditors to the principal on a specified day, or so soon as certain timber should be sold at Quebec. It was the evident intention from the contract, that the timber should be conveyed to Quebec and there sold, the money being advanced to get the timber out. Before the appointed time arrived, and while the timber was being conveyed to Quebec, an agent of the creditors obtained from the principal a confession of judgment, and sued out execution thereon and sold the timber, which sold for more than it would have brought in Quebec. Held, the surety was absolutely discharged. The terms upon which he signed had not been complied with, and whether benefited or injured, he was no longer liable on the contract.[3] But it has been held that a sale by a creditor of collateral securities placed in his hands by the principal, in violation of a stipulation for a particular notice of sale contained in the contract, under which they were pledged, does not *per se* discharge *in toto* a surety who is liable for the debt; but by such sale the creditor makes the securities his own to the extent of discharging the surety to an amount equal to their value.[4]

[1] Gillett *v.* Whitmarsh, 8 Adol. & Ell. (N.S.) 966; Holding that when the consideration for a guaranty is traversed, it must be proved by the creditor; see Smith *v.* Compton, 6 Cal. 24.

[2] Dundas *v.* Sterling, 4 Pa. St. 73.

[3] Dickson *v.* McPherson, 3 Grant's Ch. Appl. R. 185.

[4] Vose *v.* Florida R. R. Co. 50 New York, 369. Holding that a surety on a non-negotiable note, payable to a bank is not liable if the note is discounted, and the proceeds diverted from the object intended by the surety, see Farmers & Mechanics Bank *v.* Hathaway, 36 Vt. 539; Holding that a

§ 362. **When surety discharged by fraud—Other cases.**—A creditor obtained the note of a principal by fraud, and this note was afterwards guarantied by a third person. In a suit against the guarantor, it was held that he might show as defense to himself the fraud upon his principal. The court said that a person who obtained an obligation from the principal by fraud could not wipe out the fraud by obtaining a surety. "Personal defenses do not pass to others, * but defenses inherent in the thing, such as among others, fraud and duress, are available as to sureties."[1] Where a guaranty for the payment of a debt in full was given by one not a creditor, pending negotiations for a composition, and the creditor then signed the composition deed, and part of the other creditors knew, and part did not know, the above facts, it was held that the guaranty was fraudulent as to the creditors who did not know the facts, and void.[2] A creditor for a private debt due him by one member of a firm, took a note to which the firm name was signed by such member without the knowledge or consent of the other partner. A surety signed the note, supposing it to be the note of the firm, and it was held that as the partner who did not sign the note was not bound, the surety who supposed he was becoming responsible for both partners, was not bound.[3] The sureties on a bond given to secure the performance of a contract for the supply of rations for the troops of the United States, which provides "that all advances made for and on account of the supplies to be furnished pursuant to" the contract shall be duly accounted for, are not responsible for any balance of advances in the hands of the contractor at the expiration of the contract, made to him, not on account of the particular contract exclusively, but on account of that and other contracts as a common fund for supplies, where accounts for the supplies, expenditures and funds had all been throughout blended

guaranty covered a future, and not a past, indebtedness; see Pritchett *v.* Wilson. 39 Pa. St. 421; Holding that a note signed by a surety for one purpose cannot be diverted to another, see Lee *v.* Highland Bank, 2 Sandf. Ch. R. 311. Upon the subject of the discharge of a surety because another surety signed without his knowledge, see Taylor *v.* Johnson, 17 Ga. 521.

[1] Putnam *v.* Schuyler, 4 Hun. (N. Y.) 166.

[2] Coleman *v.* Waller, 3 Younge & Jer. 212.

[3] Hagar *v.* Mounts, 3 Blackf. (Ind.) 57. Holding that in such case the surety is bound if the note is under seal, see Harter *v.* Moore, 5 Blackf. (Ind.) 367.

indiscriminately by both parties, and no separate portion had been designated for this particular contract.[1]

§ 363. **Estoppel—Usury—Other cases holding surety not discharged.**—At the time a note was executed by principal and surety, the principal secretly agreed with the creditor to pay, and afterwards did pay, usurious interest, which was indorsed generally on the note as payment. Held, the surety was not discharged, because the agreement to pay usury was void, and in no way worsted the condition of the surety.[2] Where usury, which the principal had contracted to pay, was included in the amount for which a note on its face was given, it was held that an omission to disclose that fact to a surety, would not discharge him.[3] Where a constable's bond was executed by certain sureties, upon the understanding that it should not bind them unless it should be executed by other named sureties, but the sureties who signed permitted the constable to act under the bond, which was never signed by the other sureties, it was held that the sureties who signed were estopped from denying their liability.[4] Where the name of P, one of several intended sureties, is affixed to a bond, under an authority which the other sureties have at the time an opportunity of examining, and all is done that was contemplated to render the bond effectual, they cannot, in the absence of fraud, claim exemption from liability because the authority is defective and insufficient to bind P. Having had an opportunity to examine the anthority, they cannot be permitted to say they failed to do it.[5] A surety cannot resist the payment of notes for the purchase money of land, upon the ground that the creditor has not paid a prior mortgage, on the land, which he has agreed to pay.[6]

§ 364. **Miscellaneous cases holding surety not discharged.**—

[1] United States *v.* Jones, 8 Peters, 399. Holding that a surety on a note given for the pretended purchase money of goods, is not liable when there is in fact no sale, see Trammell *v.* Swan, 25 Texas, 473.

[2] Richmond *v.* Standclift, 14 Vt. 258; Davis *v.* Converse, 35 Vt. 503; Mitchell *v.* Cotten, Exr. 3 Fla. 134. To contrary effect, see Burks *v.* Wonterline, 6 Bush (Ky.) 20.

[3] Samuel *v.* Withers, 16 Mo. 532. Holding that subsequent agreement by principal on foot of instrument to pay interest does not discharge surety, see Tremper *v.* Hemphill, 8 Leigh (Va.) 623.

[4] Robertson *v.* Coker, 11 Ala. 466; May *v.* Robertson, 13 Ala. 86.

[5] McLure *v.* Clodough, 17 Ala. 89.

[6] Lyon *v.* Leavitt, 3 Ala. 430.

A guarantor of a note cannot, in the absence of fraud upon him, show in defense of a suit on the guaranty, that those who were sureties upon the note were discharged by the statute of limitations at the time he made the guaranty.[1] A bargained with B to remove a building, and C guarantied to pay for the removing, as follows: "If he does not pay you for so doing, I will see you paid, not to exceed $200." A commenced to remove the building, but was, through the fault of B, stopped by the authorities, and the building was burned: Held, A might recover against C on the guaranty for the work which had been done.[2] A guaranty was as follows: "If you give A credit we will be responsible that his payments shall be regularly made." A had before been dealing with the creditor on credit, and after the guaranty was made a little longer credit was, at his request, given him; and these last credits were a little longer than the usual course of trade: Held, the guaranty was for a dealing on terms which should be agreed upon between the parties, and the guarantor was liable.[3] M as principal, and A, F and P as sureties, executed a promissory note to raise money to pay a note on which P was sole surety of M, and the note was delivered to P in order that he might get it discounted. Before getting the note discounted, P paid the debt on which he was sole surety out of his own funds: Held, P was not then bound to cancel the note, nor surrender it to his co-sureties, but might thereafter use it as originally intended.[4]

§ 365. **When surety discharged by concealment of material facts.**—If in the contract of suretyship there is any fraudulent concealment on the part of the obligee as to a material part of the transaction to induce the surety to become a party, he is not bound. But to be material, it must be a concealment of some fact or circumstance immediately affecting the liability of the

[1] Worcester Mech. Sav. Bank *v.* Hill, 113 Mass. 25.

[2] Mellen *v.* Nickerson, 12 Gray, 445.

[3] Simpson *v.* Manley, 2 Crompton & Jer. 12; *Id.* 2 Tyrw. 86.

[4] Flanagan *v.* Post, 45 Vt. 246. Holding that the surety of a tenant cannot set up as a defense damage to the premises, unless the principal is insolvent, see Morgan *v.* Smith, 7 Hun, (N. Y.) 244. Holding that a surety is discharged if the agent of the creditor represents to him that more money is to be advanced the principal than is advanced, and part of the amount for which the surety becomes bound, is an old debt due from the principal to the creditor, see Stone *v.* Compton, 5 Bing. (N. C.) 142; *Id.* 6 Scott, 846.

surety, and bearing directly upon the particular transaction to which the suretyship attaches. And in the case of a bank cashier, where the bond covered defaults prior as well as subsequent to its execution, it was held, that concealment by the agents of the bank, that its books had been badly kept, that no bonds had been previously given, and that the directors had been negligent, etc., did not discharge the surety, because he did not become responsible for those matters, and they were not material to the risk assumed. But knowledge that the cashier was a defaulter, and concealment of that fact, would discharge the surety.[1] In order that the surety may be discharged by the concealment of material facts, it must appear that the information was fraudulently withheld from him.[2] But it has been held that the mere non-communication by the creditor to the surety, of material facts within the knowledge of the creditor, which the surety should know, although not willful or intentional on the part of the creditor, or with a view to any advantage to himself, will discharge the surety. The fraud on the surety consists in the situation in which he is placed, and not on what is passing in the mind of the creditor.[3] It has been held, that where a creditor is about to take a note with a surety from a principal whom he knows to be insolvent, the mere fact that the creditor does not voluntarily and without solicitation announce to the proposed surety the insolvency of the principal, will not release the surety, although if the surety had applied to the creditor and been misinformed, it would have been otherwise. The court said: "The creditor in such case may suppose that the proposed surety is as well advised of the pecuniary condition of the principal as he is himself, and knowing his condition, is willing to help him by becoming his surety."[4] A party who is about to take a bond of indemnity from a surety, is not obliged to explain to him the meaning or effect of the bond, unless inquiry is made of him. If he in any manner mislead the surety as to the effect of the bond, or has

[1] Franklin Bank *v.* Stevens, 39 Me. 532; Sooy *ads.* State, 39 New Jer. Law (10 Vroom) 135. As to what concealment will discharge a surety, see Franklin Bank *v.* Cooper, 36 Me. 179.

[2] Municipal Corp. of East Zora *v.* Douglas, 17 Grant's Ch. R. 462; Peers *v.* Oxford, 17 Grant's Ch. R. 472; North British Ins. Co. *v.* Lloyd, 10 Wels. Hurl. & Gor., 523.

[3] Railton *v.* Mathews, 10 Clark & Finnelly, 934.

[4] Ham *v.* Greve, 34 Ind. 18, per Worden, J. To a contrary effect, see Small *v.* Currie, 2 Drewry, 102.

reason to believe he is laboring under a mistake as to its effect, and does not correct it, equity will prevent advantage being taken of any bond so procured. But when none of these things exist, and the surety has an opportunity to examine the bond and submit it to counsel, he cannot escape responsibility by the fact that the obligee did not explain it to him.[1] An obligation to a banker by a third party, to be responsible for a cash credit, to be given one of the banker's customers, is not avoided by the fact that immediately after the execution of the obligation, the cash credit is employed to pay off an old debt due the banker, and this, though it was the intention so to apply it when the surety became bound, and this intention was not communicated to him, he making no inquiry. The court said that a surety is not entitled without inquiry to be informed of all previous dealings between the creditor and principal. "Because no bankers would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that it is material for the surety to know." The test as to whether the disclosure should be made voluntarily, is "whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect."[2] Where it was agreed between principal and creditor that a guaranty for part of the debt should be surrendered upon a new guaranty being executed, and this fact was not communicated to the party signing the new guaranty, it was held that he was not thereby discharged. The court said that the concealment, in order to discharge the guarantor, must be fraudulent. If it were otherwise, "it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept, whether the debtor was punctual in his dealings, whether he performed his promises in an honorable manner; for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, * it is quite unnecessary for the creditor, to whom the suretyship is given, to make any such disclosure."[3]

[1] Small v. Currie, 2 Drewry, 102.; to similar effect, see Wythes v. Labouchere, 3 De Gex & Jones, 593.

[2] Hamilton v. Watson, 12 Clark & Finnelly, 109, per Ld. Campbell.

[3] North British Ins. Co. v. Lloyd, 10 Exchequer, 523, per Pollock, C. B.

§ 366. **When surety discharged by concealment of material facts.**—It has been held that "one who becomes surety for another, must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it, and the party to whom he becomes a surety must be presumed to know that such will be his understanding, and that he will act upon it unless he is informed that there are extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances, and having an opportunity to make them known, and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract."[1] It was agreed between the vendors and the vendee of iron, that the latter should pay 10*s*. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors. The payment for the goods was guarantied by a third person, but the bargain between the parties was not communicated to him, and it was held that this was a fraud upon him which relieved him from liability.[2] If there is a secret valid agreement between the creditor who is selling property and the buyer, whereby a longer time is to be given than that mentioned in the contract seen and signed by the sureties, and such agreement is concealed from the sureties, they will be thereby discharged.[3] It was agreed between a creditor and principal debtor, as a condition to the creditor signing a composition deed of the principal, that the principal should assume and include in the indebtedness, which was the basis of the compromise, a debt due the creditor from another party, for which the principal was not liable, and that he should give his notes, which he did, for the balance of the debt not covered by the composition notes. This arrangement was concealed from a surety who indorsed the composition notes. Held, he was not liable upon such indorsement. The court said: "It is a clear and well settled principle, that a security given by a surety is voidable on the ground of fraud, if there is, with the knowledge

[1] Franklin Bank *v*. Cooper, 36 Me. 179, per Shepley, C. J.

[2] Pidcock *v*. Bishop, 3 Barn. & Cress. 605; *Id*. 5 Dow & Ry. 505.

[3] Peck *v*. Druett's Admr. 9 Dana. (Ky.) 486.

or assent of the creditor, such a misrepresentation to, or concealment from, the surety of the transaction, between the creditor and his debtor, that but for the same having taken place, either the suretyship would not have been entered into at all, or being entered into, the extent of the surety's liability might be thereby increased."[1] Where before the bond of a bank cashier was entered into, the officers of the bank knew that the cashier had lost money at gambling, and required a larger bond from him in consequence, and did not communicate these facts to the surety, it was held that the surety was not thereby discharged. The court said: "In this case the undisclosed information related not to the business which was the subject of the suretyship, and not to the conduct of the cashier as cashier, but to his general character. It did not follow that because he gambled he would fail in his duty as cashier."[2]

§ 367. **When surety discharged by concealment of fact that principal is a defaulter.** — If the party who takes a bond for the conduct of the principal in an employment, knows at the time that the principal is then a defaulter in said employment, and conceals the fact from the surety, such concealment is a fraud upon the surety, and discharges him.[3] But where the officers of a bank knew that a teller, while in the employ of another bank, had been suspected of embezzlement, and did not inform the surety of such teller of this fact, who signed in ignorance thereof, it was held that he was not thereby discharged. The court said that, being a mere rumor, it need not be communicated, but it would have been different if the charge had assumed positive criminal form.[4] The teller of a bank was a defaulter at the time sureties entered into a new bond for the faithful performance of his duties, but the bank did not know the fact, and did not practice any willful concealment on the surety. Held, the surety was not discharged, though the court said that if the surety had requested the bank to examine the account, or if the bank had made any false representations on which the surety relied, it would have

[1] Doughty *v.* Savage, 28 Ct. 146, per Storrs, C. J.

[2] Atlas Bank *v.* Brownell, 9 Rhode Isl. 168, per Potter, J.

[3] Franklin Bank *v.* Cooper, 39 Me. 542; Cashin *v.* Perth, 7 Grant's Ch. & Appl. Rep. 340; Smith *v.* Bank of Scotland, 1 Dow, 272; *contra*, Ætna Life Ins. Co. *v.* Mabbett, 18 Wis. 667; see, also, State *v.* Dunn, 11 La. An. 549; Sooy *ads.* State, 39 New Jer. Law (10 Vroom) 135.

[4] State *v.* Atherton, 40 Mo. 209.

been different.[1] The same thing was held in a similar case, where the officers of the bank had been grossly negligent in discovering frauds committed by a book-keeper, who was afterwards promoted to the office of cashier, and gave bond with surety for his good behavior as such.[2] An agent for the sale of coal on commission, who by agreement was bound to turn over his receipts to his employers, within a specified time, was largely in arrear, and was required by his employers to find security, and a surety became bound for him to the extent of 100*l.* The agreement of suretyship recited the terms of dealing between the employer and the agent, but the fact of the indebtedness was concealed from the surety. Held, the surety was discharged, on the ground that under the circumstances the recitals in the agreement amounted to an active misrepresentation.[3] The cashier of a bank, not having executed a bond, was guilty of fraud and embezzlement of the funds of the bank, the discovery of which might have been easily effected by the use of slight diligence on the part of the directors. They however published, in accordance with law, a statement of the condition of the bank, from which it appeared that its affairs were being prudently and honestly administered, and from which the public had a right to believe the cashier was trustworthy. Afterwards, certain persons who had seen the report, became sureties on the official bond of the cashier, and were sought to be charged thereon for his subsequent embezzlements. Held, the sureties had a right to believe that the directors, before publishing the statement, investigated the condition of the bank, and being misled by the misrepresentations of the published statement, they were released. The court said that a fraud may be perpetrated as well by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion, has a right to suppose has used reasonable diligence to inform himself, as by concealing facts known to exist, which in equity and good conscience ought to be made known.[4]

§ 368. **Continuing servant in employ after dishonesty discovered—Negligence in discovering default—Notice of default.**—Where there is a continuing guaranty for the honesty of a ser-

[1] Wayne *v.* Commercial National Bank, 52 Pa. St. 343.

[2] Tapley *v.* Martin, 116 Mass. 275.

[3] Lee *v.* Jones, 14 J. Scott (N. S.) 386; Lee *v.* Jones, 17 J. Scott (N. S.) 482.

[4] Graves *v.* Lebanon Natl. Bank, 10 Bush (Ky.) 23.

vant, if a master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing continues him in such service without the knowledge or consent of the guarantor, express or implied, he cannot afterwards have recourse to the guarantor to make good any loss which may arise from the dishonesty of the servant during the subsequent service. If the dishonesty had existed before the surety became bound, and the master had concealed it, the surety would not have been liable, and the cases are the same in principle. Moreover, upon discovering the dishonesty, the master had a right to discharge the servant, but by continuing him in the service he lost that right.[1] But it has been held that the sureties on a bond given to an employer, conditioned that his employe will faithfully account for all moneys and property of the employer coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of the employe, known to the employer, and a continuance of the employment after such default, if the default was not occasioned by the fraud or dishonesty of the employe. The court, however, intimated that it would have been different if the default had been occasioned by the fraud or dishonesty of the employe.[2] It has been held that the sureties on the bond of a deputy sheriff are not discharged by the fact that before the breach complained of, they notified the obligee of the deputy's unfitness for office, and requested his removal, which request was not complied with.[3] The mere fact that the obligee does not promptly notify the surety of a default of the principal in an employment, is not such a concealment as will discharge the surety from liability for such default. "Mere passiveness on the part of the creditor in not enforcing his remedy will not, of itself, discharge the surety, nor will failure or neglect to give notice to the surety of the principal's defalcation have that effect."[4] Where a clerk embezzled his employer's money, and the employer did not notify the clerk's surety of such embezzlement for three years, it was held the surety was not thereby discharged from liability for such embezzlement; at least if the surety was acquainted with the

[1] Phillips *v.* Foxall, Law Rep. 7 Queen's B. 666; Sanderson *v.* Aston Law Rep. 8 Exch. 73.

[2] Atlantic and Pacific Telegraph Co. *v.* Barnes, 64 New York, 385.

[3] Crane *v.* Newell, 2 Pick. 612.

[4] Pickering *v.* Day, 3 Houston (Del.) 474, per Gilpin, C. J.; Planters' Bank *v.* Lamkin, R. M. Charlton (Ga.) 29.

circumstances from any other quarter, and if the employer did not industriously conceal it from him.[1] The mere negligence of the officers of a bank in examining or checking the accounts of a clerk or cashier, does not amount to a fraud or concealment, and will not discharge his surety.[2] If the president of a bank gives a certificate to one of its clerks on dismissing him from service, expressing his satisfaction with the clerk's good conduct, it does not discharge the sureties of such clerk who have not been prejudiced thereby, if it is afterwards discovered that before the giving of such certificate the clerk had been guilty of embezzlement.[3]

§ 369. **When surety of employe of corporation not discharged because by-laws of corporation not complied with.**—The by-laws of a corporation requiring accounts or statements from an employe at stated periods, or providing that his accounts or the affairs of the corporation shall be periodically examined by other officers of the corporation, are generally held to be no part of the contract with the surety of such employe, and if such by-laws are not complied with, that fact will not discharge the surety. The by-laws are directory merely, and are made for the benefit of the corporation, and not of the surety, who becomes liable because of his confidence in his principal, and not in consequence of his confidence in the other officers of the corporation. Moreover, if the sureties of one officer of a corporation could be relieved from liability by the neglect of duty of other officers of the corporation, the corporation would be deprived of all remedy.[4] Certain persons were sureties for the repayment by weekly instalments of money borrowed by P of a loan society. One of the rules of the society provided, "that if any member becomes more than four weeks payments in arrear, the committee immediately inform the sureties of the same, and have power to institute legal proceedings against them." P died, being more than four weeks payments in arrear, but no application was made to his sureties until two years afterwards. Held, the sureties were liable. The court said: "The rule is a mere statement of the duty of the

[1] Peel v. Tatlock, 1 Bos. & Pul. 419.

[2] Black v. The Ottoman Bank, 15 Moore's Priv. Con. Cas. 472; Atlas Bank v. Brownell, 9 Rhode Isl. 168.

[3] Union Bank v. Forstall, 6 La. (Curry) 211.

[4] State v. Atherton, 40 Mo. 209; Morris Canal & Banking Co. v. Van Vorst's Admx. 1 Zab. (N. J.) 100; Albany Dutch Church v. Vedder, 14 Wend. 165; Amherst Bank v. Root, 2 Met. (Mass.) 522; Louisiana State Bank v. Ledoux, 3 La. An. 674; Mayor v. Blache, 3 La. (Curry) 500.

committee, and is not obligatory on them as between the society and the sureties."[1] The rules of a railway company required from the cashier monthly reports and payments, and the bond of the cashier and his sureties was conditioned that he should faithfully discharge his duty as required by the rules, "a copy of which he acknowledged to have received." The cashier neglected to account and pay over for six months, when he was dismissed, and the sureties were not notified of his default for three months afterwards. Held, the sureties were liable for the default. The court said that corporations can act "only by officers and agents." They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical payments, are for their own security and not for the benefit of the sureties. * "They (the sureties) undertake that he (their principal) shall be honest though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged."[2]

[1] Price v. Pool, 3 Hurl. & Colt. 437, per Bramwell, B.

[2] Pittsburg, Ft. W. & C. R. R. Co. v. Shaeffer, 59 Pa. St. 350, per Sharswood, J.

CHAPTER XVII.

OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY THE CREDITOR RELINQUISHING SECURITY FOR THE DEBT.

§ 370. **Surety discharged pro tanto, if creditor relinquish lien on property of principal for payment of the debt.**—If the creditor has a surety for the debt, and also has a lien on property of the principal for the security of the same debt, and he relinquishes such lien, or by his act such lien is rendered unavailable for the payment of the debt, the surety is, to the extent of the value of the lien thus lost, discharged from liability. This rule does not depend upon contract between the surety and creditor, but results from equitable principles inherent in the relation of principal and surety. It is equitable that the property of the principal, pledged for the payment of the debt, should be applied to that purpose, and it is grossly inequitable that in such case

the property should be diverted from that purpose, and the debt thrown upon a mere surety. Upon obtaining such a lien the creditor becomes a trustee for all parties concerned, and is bound to apply the property to the purposes of the trust. When such lien is acquired after the surety becomes bound, and even without his knowledge, the rule is the same. The surety is entitled, upon paying the debt, to subrogation to all the securities which the creditor may have at any time acquired for the payment thereof, and it results as a corollary from this proposition, that if this right is rendered unavailing by the act of the creditor, the surety is discharged to the extent that he is injured.[1] Where a creditor has released a security to the benefit of which the surety is entitled, it has been held that the burden of proving the value of the thing lost, is on the creditor. And where a judgment against the principal was discharged, and there was no proof as to its value, it was presumed to be of its face value. The court said: "It is right to apply the general rule of damages that when the amount is made incapable of estimation by the act of the wrong doer, he must be made responsible for the value it may by reasonable possibility turn out to be of."[2] If the surety knows a creditor is about to release securities on which he has a right to rely, and says nothing, the fact of his silence will not prevent his being discharged by such release, as in such case he is not called upon to speak.[3] But where such release is made at the instance and request of the surety, he is not thereby discharged.[4]

§ 371. **Instances of discharge of surety by creditor relinquishing lien on property of principal.**—In a leading case upon this

[1] Willis v. Davis, 3 Minn. 17; Cummings v. Little, 45 Me. 183; Loop v. Summers, 3 Rand. (Va.) 511; New Hampshire Savings Bank v. Colcord, 15 New Hamp. 119; Armor v. Amis, 4 La. An. 192; Wharton v. Duncan, 83 Pa St. 40; Ives v. Bank of Lansingburg, 12 Mich. 361; Kirkpatrick v. Howk, 80 Ill. 122; Finney's Admrs. v. Commonwealth, 1 Pen. & Watts (Pa.) 240; Bonney v. Bonney, 29 Iowa, 448; Hurd v. Spencer, 40 Vt. 581; Barrow v. Shields, 13 La. An. 57; Strong v. Wooster, 6 Vt. 536; Foss v. City of Chicago, 34 Ill. 488; American Bank v. Baker, 4 Met. (Mass.) 164; Rogers v. School Trustees, 46 Ill. 428; Baker v. Briggs, 8 Pick. 122; Holland v. Johnson, 51 Ind. 346; Pledge v. Buss, Johnson (Eng. Ch.) 663; *contra*, as to after acquired securities, see Newton v. Chorlton, 2 Drewry, 333; where lien was doubtful, see Crane v. Stickles, 15 Vt. 252; where defense was set up at law, see Shaw v. McFarlane, 1 Ired. Law (Nor. Car.) 216.

[2] Fielding v. Waterhouse, 8 Jones & Spen. (N.Y.) 424, per Sedgwick, J.

[3] Polak v. Everett, Law Rep. 1 Queen's B. Div. 669.

[4] Pence v. Gale, 20 Minn. 257.

subject, Law became the surety of Tierney, for his good behavior as paymaster of the East India Company. Tierney died solvent, and the company settled with his legal representatives, and 50,548 rupees were found by such settlement to be due the representatives, and the company paid that amount to them. Afterwards it was ascertained, that Tierney in fact died indebted to the Company in 96,857 rupees, and the Company by duress compelled Law to pay that sum upon the eve of his setting out from India. Upon Law's arrival in England, he filed a bill against the Company, to recover the money. Held, he was entitled to recover at least to the extent of the 50,548, as paying the principal that sum discharged the surety for so much. The court said: "Nothing is more clear than whether that was done with the consent and by the orders of the Company or not, but ignorantly by their officers, it was as to the two sureties, a complete discharge. It cannot be contended upon any principle that prevails with regard to principal and surety, that where the prinpal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can never be called upon. This payment, therefore, or permitting that part of the assets to be paid back to the administrator of the principal by the officers of the Company, whether with their consent or ignorantly, is a complete discharge of the two sureties."[1] A bought of B ten slaves for $6,750, for which he gave his note, with C as accommodation indorser. Afterwards B re-purchased of A nine of the slaves for $4,675, and it was held that he thereby deprived C of the right of subrogation to the vendor's lien on the slaves, and discharged him. The court said: "It is clear that the defendant was an accommodation indorser, and as such merely a surety for the maker. It is equally clear, that by the law of suretyship, there is a privity between the surety of a debtor and the creditor, which compels the latter to preserve all his rights against the debtor unimpaired when he intends to look to the surety for payment. This obligation, on the part of the creditor, is a corollary of the right of subrogation, which the law has established in favor of the surety, who pays the debt of his principal. If the creditor fails to comply with this obligation, or does any act which destroys or impairs this right of subrogation to his mortgages or

[1] Per Master of the Rolls in Law v. The East India Company, 4 Vesey, 824.

privileges, he thereby releases the surety."[1] A note, without surety, for $3,000, was secured by chattel mortgage on property of the maker. When it came due, the creditor advanced the principal $500 more, and a new note for $3,500, with surety, was given, the creditor telling the surety when he signed that the chattel mortgage should stand security for the new note. Afterwards the creditor released the mortgaged property, and it was held that the surety was thereby discharged.[2] A agreed to furnish material and erect a building for B, and B agreed to pay A various specified sums at particular stages in the progress of the work, the remainder to be paid sixty days after the completion of the building, and its acceptance by B. Upon this contract, C became the surety of A. The building was completed by A and accepted by B, and although B received notice before the completion of the building of the filing of various mechanics' lien suits thereon, yet he paid the contract price to A before he was bound by the contract to pay the same. B afterwards had to pay the liens, and sued C on the contract, but it was held he could not recover, as he had released C by paying A.[3]

§ 372. **Instances of discharge of surety by creditor rendering unavailing lien on property of principal.**—A principal and two sureties signed a note for $314. After the note fell due, the creditor, by the assistance of the sureties, induced the principal to give a chattel mortgage to secure the note on property worth at least $400. When the mortgage became due, the creditor took possession of the mortgaged property, and sold it for $31 to a party he employed to bid for him. This amount he credited on the note, and long afterwards sued the sureties. Held, that by wasting the property he had discharged the sureties, and could not recover. The court said: "It is a well established rule of equity jurisprudence, that where a creditor procures further security by the pledge of property, he becomes a trustee as to that property for the sureties for the payment of the debt. By his taking a mortgage or other pledge, it enures to the benefit of the sureties as well as to the creditor. In such case they have the right to discharge the debt, and compel the creditor to transfer the mort-

[1] Hereford *v.* Chase, 1 Robinson (La.) 212, per Morphy, J. Holding that the surety is not discharged by the surrender of an equitable vendor's lien on real estate, see Woodward *v.* Clegge, 8 Ala. 317; but this seems to be a very questionable case.

[2] Port *v.* Robbins, 35 Iowa, 208.

[3] Taylor *v.* Jeter, 23 Mo. 244.

gage or pledge to them for their indemnity. Where additional security is taken, it is regarded as an indemnity to both creditor and the sureties, and any waste or misapplication of the pledge operates as a release to the sureties to the extent of the waste or misapplication. Where the creditor receives such a pledge, he becomes a trustee for the sureties, and is bound to observe the duties that relation imposes as to the trust property."[1] Where the creditor willfully caused property mortgaged by the principal for the payment of the debt to be sold for much less than it was worth, it was held that the surety was discharged to the extent of the true value of the property.[2] But where property so mortgaged was sold under order of the court, and bid in by the creditor for less than its value, and afterwards sold by him for much more than he bid it in for, it was held, that in the absence of fraud or improper practice, he was not obliged to account to the surety for more than the sum for which he bid the property in.[3] Judgment was recovered against principal and surety, which was a lien on a slave of the principal then in the hands of the surety. Execution was issued, but was "held up" by order of the creditor. The principal then gave the creditor a mortgage on his personal property, including the slave above mentioned, to secure another debt. The creditor afterwards took posession of the slave and sold it, and it was removed from the state. Held, the surety was discharged to the extent of the value of the slave.[4] Where the creditor makes an agreement by which a securety is rendered valueless to a surety, who is entitled to be subrogated in respect thereto, the surety who has paid the creditor after a judgment has been obtained against him, in ignorance of such agreement, is entitled to recover from the creditor the amount of the defeated security.[5]

§ 373. **When surety wholly discharged by creditor relinquishing security for debt.**—When by the act of the creditor the surety has been deprived of the benefit of a fund for the payment of the debt, and the contract by which the surety is bound is not changed, he is only discharged to the extent that he is injured, as

[1] Phares v. Barbour, 49 Ill. 370, per Walker, J.

[2] Everly v. Rice, 20 Pa. St. 297.

[3] Brown v. Gibbons, 37 Iowa, 654.

[4] McMullen v. Hinkle, 39 Miss. 142. For a case holding surety discharged by creditor relinquishing security for the debt, see Henderson, Admr. v. Huey, 45 Ala. 275.

[5] Chester v. Bank of Kingston, 16 New York, 336.

in such case it is the fact that he is injured which entitles him to the discharge. But where the creditor relinquishes a security for the debt, and thereby materially alters the contract, the surety is wholly discharged, whether he is injured or benefited, because in such case it is no longer his contract. Thus A agreed to redeem certain shares for 6,000*l.* within twelve months, and B became his surety. A at the same time transferred to the creditor certain book accounts, amounting to 8,000*l.*, with the understanding that they should be collected, and one half the amount collected should go as payment on the 6,000*l.* Afterwards the creditors, for an equivalent in shares and cash, released to A their interest in the book accounts. Held, this discharged B altogether from his obligation, even though the book accounts would only have paid 4,000*l.* of the 6,000*l.* if they had all been collected. This was put upon the ground that the contract for which the surety became responsible, had been changed, and he was thereby wholly discharged, the same as if time had been given, or any other material alteration in the original contract had been made.[1]

§ 374. **Creditor must have a lien on the property released in order to discharge surety.**—In order that a surety may be discharged by the act of the creditor in relinquishing property in his possession belonging to the principal, he must have some lien on or interest in the property, so that it is charged with a trust in favor of the surety. If he have no such lien or interest, and is not chargeable as trustee, he is under no more legal obligation to retain the property than he would be to take any other step for the collection of the debt; and it is settled that the mere passive delay or inactivity of the creditor, where he is not chargeable as trustee, will not discharge the surety. Thus, the plaintiff held a promissory note indorsed by the defendant for the accommodation of the makers, who were insolvent. A firm of which the plaintiff was a member, owed the makers a larger sum than the amount of the note against which, if sued, they could, by statute, have set off the claim held by the plaintiff. The firm, with a full knowledge of the facts, paid the makers the amount due them: Held, the indorser was not discharged thereby. The court said that the creditor must part with no security for the payment

[1] Polak *v.* Everett, Law Rep. 1 Queen's B. Div. 669. To similar effect, see Lord Harberton *v.* Bennett, Beatty, 386; Watts *v.* Shuttleworth, 7 Hurl. & Nor. 353.

of the debt; but the security must be "a mortgage, pledge or lien—some right or interest in the property which the creditor can hold in trust for the surety, and to which the surety, if he pay the debt, can be subrogated, and the right to apply or hold must exist and be absolute." The plaintiff, in this case had no lien, and the indorser had no more right to insist that the set-off should be made than to insist that the plaintiff "should do any other act to secure or enforce payment."[1] A creditor held a judgment against principal and surety, and while it was in force, hired the principal to remove some slaves for him, and paid the principal for his services: Held, no lien was released, and the surety was not discharged.[2] A agreed to build a house for B for $13,000, and was to be paid when the building was completed. Afterward A borrowed $700 from B, and gave his note for it with surety. Afterwards B paid A more than $4,000 on the contract which A never completed: Held, the surety on the note was not discharged because B paid A the $4,000 when he was not obliged to do so. The court said that the contract to build the house, had nothing to do with the note, and no lien for the payment of the note had been relinquished, and proceeded: "I think the surety, in order to claim a discharge, must have some connection or privity with the money paid over or security parted from, and I perceive none here. It would embarrass the affairs of men too much for the practical purposes of life and of business, to say that one holding a note on two should not voluntarily pay a note due by him to one of them, and that is substantially this case."[3] A party gave his note with an indorser for certain stock of a fire insurance company, the charter of which provided that it might at its option prohibit the transfer of the stock and retain the dividends of any stockholder who was indebted to it. The principal sold his stock, and it was transferred on the books of the company without the note being paid, and it was held the surety was not thereby discharged. The court said that whenever the creditor has the means of satisfaction in his hands and chooses not to, and does not retain it, he discharges the surety, but the "means of satisfaction in his hands" means that "there must be a lien in his favor on the property in his hands conferred by law or the

[1] Glazier v. Douglass, 32 Ct. 393, per Butler, J.

[2] Hollingsworth v. Tanner, 44 Ga. 11.

[3] Beaubien v. Stoney, Speers Eq. (So. Car.) 508.

owner."[1] The surety on a negotiable note which was not due became insolvent, and the creditor applied to the principal to get other security, which the principal furnished by giving a mortgage on real estate sufficient to secure the note. At the time the mortgage was given, it was agreed between the principal and creditor that it should be released upon the principal getting another satisfactory indorser on the note. Afterwards, and before the note became due, the principal procured another and responsible indorser, who indorsed his name after that of the surety, and the creditor thereupon released the mortgage. Held, the surety was not thereby discharged, as the creditor had no right to retain the mortgage after the indorser had been procured.[2] It has been held that a surety for a bankrupt is not discharged by the creditor signing the bankrupt's certificate, even after notice from the surety not to do so.[3]

§ 375. **Instances where surety not discharged by creditor releasing property of principal.**—If the release of the property of the principal does not have the effect of changing the contract, and does not injure the surety, his liability is not affected thereby. Thus, a creditor having a judgment against principal and surety, which was a lien on real estate of the principal, agreed to release part of such real estate in order to make a title to one who purchased it for its full value, upon condition that the purchase money should be applied to the extinguishment of a mortgage which was a prior lien upon the whole estate, such application of the money was made, and the remainder of the real estate released from the lien of the mortgage. Held, the surety was not discharged, as the release of the land bettered his condition rather than otherwise.[4] After a surety became liable, the creditor obtained from the principal a policy of insurance on his life as a security for the debt. The principal became bankrupt, and the creditor surrendered the life policy upon receiving from the office from which it was issued, its then value. Held, the

[1] Perrine *v.* Firemen's Ins. Co. 22 Ala. 575, per Phelan, J.

[2] Pearl Street Congregational Society *v.* Imlay, 23 Ct. 10.

[3] Browne *v.* Carr, 7 Bing. 508; *Id.* 5 Moore & Payne, 497; Guild *v.* Butler, 5, The Reporter, 15. To the effect that the creditor may, without discharging the surety, purchase property of the principal and pay him for it before the note upon which the surety is liable becomes due, see Higdon *v.* Bailey, 26 Ga. 426.

[4] Neff's Appeal, 9 Watts & Serg. (Pa.) 36.

surety was not discharged, as it was doubtful whether the policy would have been kept up, and to have kept it up would have been a speculation which might have turned out unfavorably for the surety.[1] If the security is worthless when given by the principal, or afterwards without fault on the part of the creditor becomes worthless, this does not discharge the surety.[2] If a creditor release from the operation of a judgment, lands in which it is thought the principal may have some contingent interest, in order to relieve the premises from a possible cloud arising therefrom, this does not exonerate the surety where it is shown that the principal has in fact no interest in the lands so released, and that the judgment was in consequence no lien upon such lands. Where a mortgage was given by a principal to secure seven bonds, one of which was assigned to a third party, and the holder of the other six released the mortgage, it was held that the surety on the assigned bond was not thereby released from liability on such bond. The assignee had done nothing to prejudice the surety's rights, and it was questionable whether the holder of the six bonds could release the mortgage as to the assigned bond.[4] Principal and surety signed a bond, and the principal gave a mortgage to secure it. Afterwards the principal agreed to give the creditor a different security, and the creditor delivered up the mortgage, and agreed to, but did not deliver up the bond. The principal died, and the creditor sued the surety, who filed a bill to have the bond delivered up. Held, he was not entitled to relief in equity. The court said: "Here the defendant was shipwrecked, and had this plank to save him, and * (the court) would not take this from under him, to let him sink, and make him lose his debt."[5] The lessor of premises refused the offer of the lessees to allow him to collect rent from the under tenants of the premises, and apply it on the accruing rent, without notifying the sureties of the lessees of such offer. Held, the sureties were not thereby discharged, as the lessor was under no obligation to undertake

[1] Coates v. Coates, 33 Beavan, 249.

[2] Hardwick v. Wright, 35 Beavan, 133.

[3] Blydenburgh v. Bingham, 38 New York, 371. To similar effect, see Lilly v. Roberts, 58 Ga. 363; Adams v. Logan, 27 Gratt. (Va.) 201.

[4] Muller v. Wadlington, 5 Richardson N. S. (So. Car.) 342.

[5] Purefoy v. Jones, Freeman's Ch. 44, per Finch, C.

the collection of the rent from the under tenants.[1] A judgment was recovered against principal and surety, which became a lien on real estate of the principal. Afterwards, the creditor brought suit on the judgment, against both principal and surety, and judgment was had against the principal, and the case was continued as to the surety. The surety then filed an amended answer, setting up that by the last judgment the lien of the first had been lost, and other liens had intervened, but it was held to be no defense. The court said that when the surety assumed his obligation, he knew that the remedies provided by law might be enforced. If, in the second suit, judgment had been rendered gainst the principal and surety at the same time, the surety could not have set up the defense, because it would not then have existed, and the effect of the second judgment would have been the same. The surety was not, therefore, prejudiced.[2]

§ 376. **When surety discharged if bank does not retain debt due it out of deposit of principal.**—Principal and surety were indebted to a bank on a note which was due. The principal deposited with the bank more than the amount of the note, upon the express agreement that he should buy cattle and check against this money to pay for them, and that the checks should be paid. This was done, and the surety claimed to be discharged because the bank, having money enough in its possession to pay the note, had not kept it. Held, the surety was not discharged, because the money having been deposited under a special agreement, the bank had no lien on it and could not divert it from the purpose agreed upon.[3] In this case the deposit was special, but where the principal has a general balance at a bank after a debt to the bank is due, the authorities differ as to the duty of the bank to retain the amount of the debt. Thus principal and surety were liable on a bill of exchange held by a bank. When the bill became due, and for a long time thereafter, the principal had money in the bank where he deposited and drew out money from time to time, and at one time, after the bill was due, a balance was struck between the bank and the principal, and he had more than enough money in the bank to pay the bill. Held, the surety was not dis-

[1] Ducker *v.* Rapp, 9 Jones & Spencer (N.Y.) 235.

[2] Perry *v.* Saunders, 36 Iowa, 427.

[3] Wilson *v.* Dawson, 52 Ind. 513. To a similar effect, with reference to lien on a note when it is deposited in a bank for a special purpose, see Neponset Bank *v.* Leland, 5 Met. (Mass.) 259.

charged by the failure of the bank to retain the money to pay the bill. The court said that mere delay would not discharge the surety, and if the bank was under no obligation to sue, it was under no "obligation to violate the terms on which the money was obviously placed in the bank, and apply it to the payment of the bill for the benefit of the indorsers." The money was placed in the bank for the payment of the checks of depositors, and the failure of the bank to retain it "was no more to the prejudice of the indorsers than their forbearing to sue the principal."[1] In a case where precisely the opposite doctrine was held, the court said: "Upon what principle of justice can such a creditor in a court of equity claim to hold the surety bound, after the debt had been in point of fact, paid, if the creditor had elected to say so, or to so consider it. The creditor could have set off the debt and charged it in the account, and having the power, was it not his duty to do so in justice to the surety?"[2]

§ 377. **When surety not discharged by creditor releasing principal from imprisonment.**—As a general rule, the surety is not discharged by the mere fact that the creditor releases the principal from imprisonment on account of the debt, unless he is injured thereby. The body of a principal was taken on final process, and he was about to be committed to jail, but was, by the advice and consent of a guarantor of the debt, released from custody. Held, that while the discharge was a technical satisfaction of the debt, as between the principal and creditor, yet it was not a payment in fact, and did not discharge the guarantor. "The terms of the guaranty are that the note shall be paid, and nothing short of actual payment, or some act or neglect of the creditor, by which the guarantor is prejudiced, will discharge the liability."[3] A surety is not discharged by the mere acceptance by the obligee of a common appearance, where the principal has been arrested at the suit of the obligee, and where, in consequence of the release of the principal from imprisonment, he assigns all his property to the obligee for the payment of the obligation, and it is applied to that purpose. If the principal had gone to jail, and been discharged under the insolvent act, the property would have been divided among his creditors, and less would have gone to

[1] Martin v. Mechanics Bank, 6 Harr & Johns. (Md.) 235, per Buchanan, J.

[2] McDowell v. Bank, 1 Harrington (Del.) 369, per Black, J.; see also, Voss v. German American Bank, 83 Ill. 599.

[3] Terrell v. Smith, 8 Ct. 426, per Bissell, J.

the payment of the obligation than was realized for that purpose. The surety was therefore benefited, and not injured.[1] The body of the principal in a bond, having been taken on final process, the creditor, with the principal's consent, discharged him from custody under the provisions of a statute which authorized a plaintiff to discharge, with his consent, a debtor in custody under a *ca. sa.*, without weakening the force of the judgment, or impairing the right to a *fi. fa.*, or a subsequent *ca. sa.* Held, the surety had not been in any manner injured, and was not discharged.[2] A special act of congress released a principal from imprisonment upon his assigning all his estate to the United States, for the security of the debt upon which he was imprisoned, and also provided that any estate which he might afterwards acquire, might be taken the same as if he had not been released. Held, the surety was not discharged. The court said: "That the same rules of contract are applicable where the sovereign is a party, as between individuals, is admitted; but the right of the sovereign to discharge the debtor from imprisonment, without releasing the debt, is clear. And how can such a release discharge the surety? * The recourse of the government against the property of * (the principal), still remains unimpaired, consequently the judgment remains unsatisfied, and no act has been done to the prejudice of the surety."[3]

§ 378. **Surety is discharged if creditor release levy on property of principal.**—If the creditor recovers a judgment against principal and surety, or against the principal alone, and execution is issued thereon and levied upon real or personal property of the principal subject thereto, and such property is, by act of the creditor, released from the levy and lost as a security, the surety is discharged to the extent that he is injured thereby.[4] This is the

[1] Commissioners of Berks Co. *v.* Ross, 3 Binney (Pa.) 520.

[2] Treasurers *v.* Johnson, 4 McCord Law (So. Car.) 458.

[3] Hunter *v.* United States, 5 Peters, 173, per M'Lean, J. To similar effect, see United States *v.* Stansbury, 1 Peters, 573; Hunt *v.* United States, 1 Gallison, 32; United States *v.* Sturges, 1 Paine, 525.

[4] Dixon *v.* Ewing's Admrs. 3 Ohio, 280; Houston *v.* Hurley, 2 Del. Ch. R. 247; Cooper *v.* Wilcox, 2 Devereux & Bat. Eq. (Nor. Car.) 90; Morley *v.* Dickinson, 12 Cal. 561; State Bank *v.* Edwards, 20 Ala. 512; People *v.* Chisholm, 8 Cal. 29; Spencer *v.* Thompson, 6 Irish Com. Law Rep. 537; Winston *v.* Yeargin, 50 Ala. 340; Comstock *v.* Creon, 1 Robinson (La.) 528; Alexander *v.* Bank of Commonwealth, 7 J. J. Marsh. (Ky.) 580; Bank *v.* Fordyce, 9 Pa. St. 275; Moss *v.* Pettengill, 3 Minn. 217; Shannon *v.* McMullin, 25 Gratt.

most frequently occurring illustration of the rule that the surety is entitled to the benefit of all the securities which the creditor, after the surety becomes bound, or at any time, may obtain for the payment of the debt. The creditor is not bound to be diligent in obtaining securities for the debt, but having obtained them, he at once becomes a trustee thereof for all parties concerned. In a leading case on this subject, the creditor held a warrant of attorney from the principal to confess judgment, of which the surety did not know, and the creditor entered up judgment thereon, and levied on chattels of the principal sufficient to satisfy the debt, and afterwards withdrew the execution, and the property was lost as security: Held, the surety was thereby discharged. The Lord Chancellor said: "The mere circumstance that the * (surety) did not know that the * (creditor) held a warrant of attorney would be of no consequence, because sureties are entitled to the benefit of every security which the creditor had against the principal debtor, and whether the surety knows the existence of those securities is immaterial, and I think it clear, that though the creditor might have remained passive, if he chose, yet if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety both at law and in equity. * The principle is that he is a trustee of his execution for all parties interested."[1] If the creditor releases the lien of a judgment or execution on the property of the principal, the surety will be released, even though the creditor did not at that time know the fact of suretyship. With reference to this, it has been said that it is the fact of the relation of principal and surety "with or without the creditor's knowledge of it, that gives the right of substitution. The right is inherent in the transaction, if the relation exists. * While the law enforces the payment of * (the creditor's)

(Va.) 211; Commonwealth *v.* Miller's Admrs. 8 Serg. & Rawle (Pa.) 452; Baird *v.* Rice, 1 Call. (Va.) 18; Finley *v.* King, 1 Head (Tenn.) 123; Mulford *v.* Estudillo, 23 Cal. 94; McHaney *v.* Crabtree, 6 T. B. Mon. (Ky.) 104; Brown *v.* Exrs. of Riggins, 3 Kelly (Ga.) 405; Mellish *v.* Green, 5 Grant's Ch. R. 655; Curan *v.* Colbert, 3 Kelly (Ga.) 239; Parker *v.* Nations, 33 Texas, 210; Davis *v.* Mikell, 1 Freem. Ch. R. (Miss.) 548; Jenkins *v.* McNeese, 34 Texas, 189; Jones *v.* Bullock, 3 Bibb. (Ky.) 467; Springer *v.* Toothaker, 43 Me. 381; Watson *v.* Read, 1 Cooper's Ch. R. (Tenn.) 196; *contra*, Union Bank *v.* Govan, 10 Smedes & Mar. (Miss.) 333.

[1] Mayhew *v.* Crickett, 2 Swanston, 185, per Lord, Eldon C.

claim, it does not make his will the law of the contract, and allow him to shift the burden from the property of one defendant to that of the other, at his pleasure. Nor may he blindly act so as to affect the rights of others, and then excuse himself by saying he did not know. He should not in any way discharge one of his joint debtors without the assent of the other, for that other has an interest in that act. The knowledge of the * (creditor) of the fact of suretyship, was therefore immaterial."[1] It has been held that if the creditor releases from the lien of a judgment sufficient real estate of the principal to pay the debt, he thereby discharges the surety, even though there remains enough real estate of the principal, subject to the lien of the judgment, to pay it. To hold the surety liable in such case, would be throwing the risk entirely upon him. He is discharged to the extent of the value of the property released.[2] It has been held that if the sheriff, without direction from the creditor, releases personal property of the principal which he has levied on, the surety is discharged *pro tanto*, and that the act of the sheriff in this regard, is the act of the creditor.[3] It has also been held that the return of a sheriff indorsed on an execution, which states that the execution had been "held up" by order of the creditor, is no evidence of that fact.[4]

§ 379. **Instances where surety discharged by release of levy on property of principal.**—A sheriff levied on property of a principal debtor sufficient to satisfy the execution, and by negligence and unreasonable delay, released the levy and became responsible to the creditor. He then paid the creditor, and took from him an assignment of the judgment to himself, and levied it on property of the surety. Upon a bill filed by the surety to enjoin proceedings against himself, it was held that he was discharged.[5] A joint judgment having been obtained against principal and surety, execution was issued and became a lien on sufficient personal property of the principal to pay the debt, but no levy was made. The creditor, under color of a fraudulent assignment

[1] Holt *v.* Bodey, 18 Pa. St. 207. per Lowrie, J.; Martin *v.* Taylor, 8 Bush (Ky.) 384; Irick *v.* Black, 2 C. E. Green, (N. J.) 189.

[2] Holt *v.* Bodey, 18 Pa. St. 207.

[3] Lumsden *v.* Leonard, 55 Ga. 374. To a contrary effect, see Summerhill *v.* Trapp, 48 Ala. 363. See, also, Wright *v.* Watt, 52 Miss. 634.

[4] Shannon *v.* McMullin, 25 Gratt. (Va.) 211.

[5] Miller *v.* Dyer, 1 Duvall (Ky.) 263.

from the principal, took this property out of the county, and beyond the reach of execution, and appropriated the proceeds to himself, his object being to collect the judgment from the surety. Held, the surety was discharged from the judgment.[1] In another case judgment was recovered against principal and surety, and property of the principal, sufficient to satisfy the judgment, was levied on. Afterwards D, a creditor of the principal, took a mortgage on the same property from the principal, and paid the judgment creditor the amount due on the judgment, and took an assignment of it from him. D then released the levy and sold the property under his mortgage, and proceeded against the surety on the judgment. Upon bill filed by the surety to restrain proceedings on the judgment, it was held he was discharged. The court said: "The surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound, as soon as such a security is created, and by whatever means the surety's interest in it arises; and the creditor cannot himself, nor by any collusion with the debtor, do any act to impair the security or destroy the surety's interest."[2] Principal and surety confessed a judgment which became a lien on land of the principal sufficient to pay the debt. Afterwards the principal sold the land to D, and afterwards the creditor sold the judgment to D, who endeavored to revive it against the surety. Held, the surety was discharged, and the judgment could not be revived against him.[3] Judgment having been recovered against a principal, and B and C, who were sureties, an execution was levied on the property of B. Pending the levy, A bought this property from B, and afterwards obtained an assignment of the judgment, the whole amount of which he endeavored to have satisfied out of C's property. Held, equity would restrain him from collecting from C more than the fair proportion of the debt, whether he had notice of the lien of the execution when he bought the judgment or not.[4] Equity will, at the instance of the surety, enjoin the creditor from releasing a levy on property of the principal, and this whether the principal is insolvent or not. The ground of relief in such case is that the property of the principal should pay the debt. The insolvency

[1] Robeson v. Roberts, 20 Ind. 155.

[2] Nelson v. Williams, 2 Dev. & Bat. Eq. (Nor. Car.) 118.

[3] Wright v. Knepper, 1 Pa. St. 361.

[4] Dobson v. Prather, 6 Ired. Eq. (Nor. Car.) 31.

of the principal might quicken the action of the court, but is not necessary to relief.[1]

§ 380. **Surety not discharged unless injured by release of levy on property of principal.**—As a general rule, the liability of the surety is not affected by the release of a levy on property of the principal unless he is injured thereby. Thus, where a surety had a mortgage for his indemnity on the property which was released from the levy, it was held that he was not discharged by such release, as his mortgage remained in force, and he was not injured.[2] So where real estate of a principal was levied on, and after two or three postponements, the execution was returned by order of the plaintiff without a sale being made, but the lien of the judgment on the real estate still subsisted, and it did not appear that any loss had happened by the return of the execution, it was held the surety was not discharged. There was no loss of a security, but simply a giving of time without any agreement to do so.[3] Execution was issued against a principal, and property of his worth $90 was levied on He then gave the creditor an order for $100 on his wife's interest in her father's estate, which was good for that amount, and could not have been reached by the execution, and in consideration thereof the creditor released the levy. Held, the surety was not discharged, because he was benefited by the transaction.[4] Where real estate of the principal was levied on, the boundaries of part of which were so undefined that a suit in chancery was necessary to establish them, and the remainder of which was incumbered, but not for its full value, it was held that the surety was not discharged by a release of the levy. The court said: "The law imposes no duty on the judgment creditor, to encounter the expense or delay of a suit in chancery to ascertain incumbrances, or define boundaries of his debtor's lands."[5] An execution was levied upon partnership property to satisfy a debt due from one

[1] Irick v. Black, 2 C. E. Green (N. J.) 189.

[2] Glass v. Thompson, 9 B. Mon. (Ky.) 235; Stringfellow v. Williams, 6 Dana (Ky.) 236; see, also, for a peculiar case on this subject, Bartlow v. Boude, 3 Dana (Ky.) 591; see, also, Lilly v. Roberts, 58 Ga. 363; Adams v. Logan, 27 Gratt. (Va.) 201.

[3] Sasscer v. Young, 6 Gill & Johns. (Md.) 243.

[4] Thomas' Exr. v. Cleveland, 33 Mo. 126.

[5] Commercial Bank v. Western Reserve Bank, 11 Ohio, 444, per Lane, C. J.

of the partners, but the creditor finding that the extent of the firm liabilities were so great that nothing could be realized from the levy, abandoned it. Held, he might adopt this course, but by so doing he took upon himself the responsibility of establishing the facts of the insufficiency of the property, if any surety or party standing in that relation, should question the propriety of the release.[1] It has been held that the mere fact that personal property of the principal sufficient to satisfy the debt, has been levied on but not sold, for want of bidders, does not discharge the surety.[2] If a surety, after he has been discharged by the release of a levy on property of the principal, promises to pay the debt with knowledge of the facts, but without any new consideration he is bound.[3]

§ 381. **Surety discharged if creditor release attachment on property of principal—Dismissing suit against principal.**—If the creditor levies an attachment upon property of the principal, and afterwards releases it, this will have the same effect to discharge the surety as the release of any other lien on the property of the principal for the payment of the debt. Thus, a city treasurer became a defaulter, and the city levied an attachment on property of his almost sufficient to satisfy the debt. Another party intervened, claiming the property as partner of the defaulter. The matter was left to a referee under an agreement that his decision should be the judgment of the court. He decided that the intervenor was entitled to the greater portion of the property, and it was turned over to him. In a suit on the treasurer's bond against his surety, it was held that the intervenor was not entitled to the property, and the attachment was the first lien on it, and that giving up the property was an act of the creditor which discharged the surety to the extent of the value of the property surrendered. The court said the creditor was not bound to commence proceedings, but having done so, he "cannot relinquish any hold he has acquired upon the property of the debtor, without resorting to the proper proceedings to make therefrom the debt. And this rule is alike applicable if the property has been voluntarily placed in the hands of the creditor, or he has acquired a lien thereon by proceedings at law."[4] It has been

[1] Moss v. Pettingill, 3 Minn. 217.
[2] Moss v. Craft, 10 Mo. 720.
[3] Mayhew v. Cricket, 2 Swanston, 185.
[4] City of Maquoketa v. Willey, 35 Iowa, 323, per Beck, C. J.; Bank of Missouri v. Matson, 24 Mo. 333; Ash-

held that the liability of a surety is not affected by the fact that the creditor releases an attachment on property of the principal, upon the ground that the creditor is not bound to use active diligence to obtain payment of the debt.[1] This, however, ignores the fact that as soon as a creditor obtains a lien on the property of the principal for the payment of the debt, he becomes a trustee; and it is difficult to perceive why the release of an attachment lien on the property of the principal should not have the same effect as the release of any other specific lien upon property of the principal, acquired by the creditor after the surety becomes bound. The mere dismissal by the creditor of a suit, which he has commenced against the principal, and by which, if prosecuted, the money could have been collected, will not discharge the surety. In such case, no lien is lost, and the transaction amounts to simple forbearance without consideration.[2]

§ 382. **When surety discharged by failure of creditor to cause execution to be levied on property of principal.**—If the creditor, having an execution against the principal, or against the principal and surety, causes it to be returned without any levy being made, he does not thereby discharge the surety, even though the principal had property subject to the execution, from which the debt might have been made if the execution had been levied, and such property becomes unavailable for the payment of the debt, provided no lien has attached by virtue of the issuing of such execution, and none is lost by its return.[3] The creditor not being bound to active diligence to obtain a lien, is no more bound to levy an execution which is not otherwise a lien, than he would be to commence suit or take any other steps to obtain a lien. It has, however, been held, where execution was issued against a principal which became a lien on his property sufficient in amount

by's Admx. v. Smith's Exr. 9 Leigh (Va.) 164.

[1] Executors of Baker v. Marshall, 16 Vt. 522; Montpelier Bank v. Dixon, 4 Vt. 587; Barney v. Clark, 46 New Hamp. 514. See, also, on this subject, Bellows v. Lovell, 5 Pick. 307.

[2] Somerville v. Marbury, 7 Gill & Johns. (Md.) 275. For a peculiar case on this subject, see McVeigh v. The Bank of the Old Dominion, 26 Gratt. (Va.) 785.

[3] Hetherington v. Bank at Mobile, 14 Ala. 68; Thornton v. Thornton, 63 Nor. Car. 211; Caruthers v. Dean, 11 Smedes & Mar. (Miss.) 178; Sawyer v. Bradford, 6 Ala. 572; Hunter v. Clark, 28 Texas, 159; Summerhill v. Tapp, 52 Ala. 227; Woodburn v. Friend, 10 La. (Curry,) 496; Humphrey v. Hitt, 6 Gratt. (Va.) 509; McKenny's Exrs. v. Waller, 1 Leigh (Va.) 434; Royston v. Howie, 15 Ala. 309; Sawyer's Admr. v. Patterson, 11 Ala. 523.

to satisfy the debt, and it was returned not levied by order of the creditor, and the property was lost as a security, that the surety was not thereby discharged on the ground, that "the relinguishment of so imperfect a lien is not like the giving up of funds actually placed by the principal in the creditor's hands to be appropriated to the payment of the debt, nor like goods placed in the custody of the law for that purpose by the actual levy of a *fieri facias*."[1] The better opinion, and the one sustained by the weight of authority, however, is that if when the execution is issued, it becomes a valid lien on property of the principal without any levy being made, and such lien is lost in consequence of the return of the execution without a levy by procurement of the creditor, and the surety is thereby injured, he is discharged *pro tanto*.[2] There is no good reason for a distinction in this regard between valid liens of various kinds. And in all cases of this character, the distinction should be clearly borne in mind, between the case of a creditor holding no lien, who is not bound to active diligence, and the case of a creditor who does hold a lien on property of the principal for payment of the debt, and who in such case is a trustee for all concerned, and bound to use the same diligence as any other trustee similarly situated.

§ 383. **When and how far surety discharged by release of co-surety.**—If there are several sureties liable for the same debt, and the creditor releases one of them from liability, but does not thereby materially alter the contract, he generally releases the remaining sureties to the extent that such released surety would otherwise have been liable to contribute to his co-sureties.[3] With reference to this

[1] Naylor *v.* Moody, 3 Blackford, (Ind.) 92, per Blackford, J. See, also, on this subject, Lenox *v.* Prout, 3 Wheaton, 520; Morrison *v.* Hartman, 14 Pa. St. 55.

[2] Dills *v.* Cecil, 4 Bush. (Ky.) 579; Ferguson *v.* Turner, 7 Mo. 497; Robeson *v.* Roberts, 20 Ind. 155; Blandford's Admr. *v.* Barger, 9 Dana (Ky.) 22; Brown *v.* Exrs. of Riggins, 3 Kelly, (Ga.) 405; see, also, on this subject, Miller *v.* Dyer, 1 Duvall, (Ky.) 263; overruling Finn *v.* Stratton, 5 J. J. Marsh (Ky.) 364.

[3] Jemison *v.* Governor, 47 Ala. 390; State *v.* Matson, Admr. 44 Mo. 305; Schock *v.* Miller, 10 Pa. St. 401; Klingensmith *v.* Klingensmith's Exr. 31 Pa. St. 460. *Contra*, see Starry *v.* Johnson, 32 Ind. 438. See, also, on this subject, Thompson *v.* Adams, 1 Freeman's Ch. R. (Miss.) 225, and *ex parte* Gifford, 6 Vesey, 805. To the effect that the discharge of one surety entirely releases all the sureties, see Stockton *v.* Stockton, 40 Ind. 225; Tourns *v.* Riddle, 2 Ala. 694. To the effect that the discharge of one surety entirely discharges all the sureties when the contract is thereby varied, see Mitchell *v.* Burton, 2 Head (Tenn.) 613.

it has been said that: "The same principles of equity exist between co-sureties to be relieved to the extent of the share of each in the debt by acts of the creditor, as exist between them and the principal, to be relieved of the whole debt by similar acts of the creditor with the principal; and where a creditor by his acts discharges one surety or actively relinquishes a lien, he can only hold the other surety liable for his *pro rata* share of the debt."[1] A principal being indebted to a creditor in 8,000*l.*, gave him certain securities, and also as additional security, four notes, each for 2,000*l.*, and each indorsed by a separate surety. Time was given to three of the sureties, and it was held, that the remaining surety was released from three-fourths of the note for which he had become bound.[2] Judgment was recovered against B, one of five sureties on a note, and an execution was levied on property of B sufficient to pay the debt, but the creditor ordered the execution to be returned unsatisfied. Subsequently the creditor commenced suit against C, another of the sureties. Held, that if all the sureties were solvent, the creditor could recover from C only four-fifths of the debt, but if all the other sureties were insolvent, he could only recover one half thereof.[3] B and C were jointly bound as sureties for A, and D, the wife of A, charged her separate estate to indemnify B from all loss, etc. The whole loss was paid by B alone, who afterwards, without the concurrence of D, released his co-surety C. Held, that D's separate estate was thereby released from one-half the loss suffered by B.[4] Where the sureties in a bond were only bound severally and for different amounts, it was held, that the release of one of them by striking his name from the bond, did not affect the liability of the others at law.[5] It has been held that if a county court, under the provisions of a statute, releases one of several sureties in a guardian's bond, it does not affect the liability of the other sureties who became bound, knowing the law, and must be presumed to have contemplated such an event.[6] It has also been held that the act of the creditor in releasing an attachment levied on the property of one surety does not discharge another surety.[7] If the creditor releases one

[1] Rice *v.* Morton, 19 Mo. 263.

[2] Stirling *v.* Forrester, 3 Bligh, 575.

[3] Dodd *v.* Winn, 27 Mo. 501.

[4] Hodgson *v.* Hodgson 2 Keen, 704.

[5] Collins *v.* Prosser, 1 Barn. & Cress. 682; *Id.* 3 Dow. & Ryl. 112.

[6] Frederick *v.* Moore, 13 B. Mon. (Ky.) 470.

[7] Chapman *v.* Todd, 60 Me. 282.

surety, but expressly provides that such release shall not affect the liability of the other sureties, it has been held that such other sureties remain bound the same as if no release had been given.[1]

[1] Thompson *v.* Lack, 3 Man. Gr. & Scott, 540. See, also, Hewitt's Admr. *v.* Adams, 1 Patton, Jr. & Heath (Va.) 34.

CHAPTER XVIII.

OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY THE CREDITOR NEGLIGENTLY LOSING SECURITY FOR THE DEBT.

§ 384. **Surety discharged if creditor negligently lose security for the debt—Loss of collaterals.**—The creditor who has effects of the principal in his hands, or under his control, for the security of the debt, is a trustee for all parties concerned, and if such effects are lost through the negligence or want of ordinary diligence of the creditor, the surety is discharged to the extent that he is injured, the same as if the effects had been lost by the positive act of the creditor. In such case, he is bound to be diligent in preserving such effects, to the same extent that any other trustee similarly situated is bound to use diligence. The kind of diligence required will be governed by the circumstances of each particular case. If the principal places in the hands of the creditor, as collateral security for the debt, an obligation of a third person, the creditor is, without any special agreement to that effect, bound to use due dilligence to collect the same, and to charge all the parties thereto, and if anything is lost on account of his failure to use such diligence, not only the surety, but the principal, also is discharged to the extent that he is in-

jured.[1] With reference to this, it has been said that: "The assignor of collaterals parts with his control over them, and the assignee should be bound to use proper exertions to render them effectual for the purpose for which they were assigned. The principle is, that when a right of action or a judgment is transferred by a debtor to his creditor, to secure the debt, or as collateral security, ordinary diligence must be used to make it available, and if a loss occurs by negligence, even passive negligence, which is unreasonable, and results in loss, it will be a good defense to a suit on the original debt."[2] It has also been said that "The necessary care and attention should be bestowed to preserve the value of whatever is thus voluntarily, and with a view to one's own interest, taken under his control."[3] It has been held that the question "What is due diligence," is when the facts are ascertained one of law; and where a note was due when the creditor took it as collateral, and the maker was then solvent, but the creditor did not bring suit on it for three months, when the maker had become insolvent, it was held that this was such negligence as charged the creditor with the loss of the note.[4]

§ 385. **Instances of discharge of surety by creditor negligently losing benefit of collateral security.**—A creditor who was bound to use diligence to charge a guarantor, commenced a suit and levied an attachment on property of the principal, but failed to collect the debt because the attachment was improperly served, and it was held that the guarantor was thereby discharged.[5] The assignee of a note as collateral security was notified of the impending insolvency of the maker, and warned that if he did not sue or surrender the note forthwith, he must take the risk, and would be held responsible. The debt being lost in consequence

[1] Kemmerer *v.* Wilson, 31 Pa. St. 110; Pickens *v.* Yearborough's Admr. 26 Ala. 417; Noland *v.* Clark, 10 B. Mon. (Ky.) 239; Jennison *v.* Parker, 7 Mich. 355; Sellers *v.* Jones, 22 Pa. St. 423; Hill *v.* Bourcier, 29 La. An. 841; Lamberton *v.* Windom, 18 Minn. 506; Douglass *v.* Reynolds, 7 Peters, 113; Slevin *v.* Morrow, 4 Ind. (2 Porter) 425; Lee *v.* Baldwin, 10 Ga. 208; Shippen's Admr. *v.* Clapp, 36 Pa. St. 89; Wakeman *v.* Gowdy, 10 Bosw. (N. Y.) 208. To the effect that the surety is not discharged if collaterals in his hands depreciate because he does not realize on them as soon as he might, see Brick *ads.* The Freehold National Banking Co. 8 Vroom (N. J.) 307.

[2] Word *v.* Morgan, 5 Sneed (Tenn.) 79, per Caruthers, J.

[3] Trotter *v.* Crockett, 2 Porter (Ala.) 401.

[4] Wakeman *v.* Gowdy, 10 Bosw. (N. Y.) 208.

[5] Beach *v.* Bates, 12 Vt. 68.

of a failure to sue when notified as above, the assignee was held responsible for the amount of the note.[1] L, who owned S $1,000, for which S held L's note and a mortgage on a printing press, sold the press to C for $5,000, and C agreed to satisfy the note and mortgage. S refused to release L, and take C for the debt, but there was evidence that he agreed to take C's liability as collateral security for the debt. Afterwards S gave C time, and the mortgaged property was destroyed by fire: Held, that L was discharged to the extent that he was injured thereby.[2] A bank is bound to take ordinary care only of bonds pledged to it as collateral security for the payment of a note deposited with it, and if using such care, the bonds are stolen by burglars, the bank is not liable for their loss.[3] Where the creditor at the time he received a collateral security, agreed to keep it and return it to the wife of the principal when he paid the debt, it was held that this was a complete answer to a defense set up by the surety to the effect that the creditor had not realized on the collaterals as soon as he might, and that they had depreciated in value.[4]

§ 386. **Surety discharged, if creditor negligently lose security for the debt—Instances.**—If the creditor has a lien on the property of the principal for the payment of the debt, and negligently suffers the property to be diverted from that purpose, or lost as a security, the surety is discharged to the extent of the security lost, and this though the lien was obtained after the surety became bound, and without his knowledge. Thus, after principal and surety had signed a note, and without a previous agreement to that effect, the principal gave the creditor a mortgage on personal property, to secure the same. The creditor allowed the principal to sell and waste the property, and it was held that the surety was thereby discharged. The court said the creditor was under no obligation to seek for or take the mortgage, "but if he chose to do so, it must be regarded as a bailment for the interest of all parties, and imposing upon the creditor the obligation of ordinary care and diligence in respect to them." The creditor, taking a pledge, is bound to the principal to use ordinary diligence in taking care of the pledge, and must account to the pledgor for any loss happening for want of such diligence.

[1] Bonta v. Curry, 3 Bush (Ky.) 678.

[2] Lochrane v. Solomon, 38 Ga. 286.

[3] Jenkins v. National V. B. of Bowdoinham, 58 Me. 275.

[4] Brick v. Freehold National Banking Co. 8 Vroom (N. J.) 307.

Much more must he account to a surety. "Indeed, it would be absurd to hold that the surety would not be discharged by the negligence, which would discharge the principal, and it would be equally absurd to contend that the duty of the creditor to use ordinary care was lessened by the fact that there was a surety. * If the creditor chooses to accept such securities, the law will imply that he undertakes to hold them in trust for the parties interested, and to use ordinary diligence in the care of them, and upon payment of the debt by the surety, he is bound to transmit them unimpaired to him. If he relinquish such securities to the principal, it is well settled that he thereby exonerates the surety at least to the extent of their value. * Between this class of cases, namely, the release of securities by the direct act of the creditor, and allowing them by want of ordinary care to be lost or destroyed, we are unable to perceive any solid distinction. In both cases the surety may have been lulled into security, and prevented from taking the counter security, that he might otherwise have required, relying, as he had a right to do, upon the creditor's holding such securities fairly and impartially."[1] A made a note for $5,000, payable to B, who indorsed it to C. A lodged with C the note of a third person for $10,000, secured by mortgage on real estate as collateral security for the note of $5,000. The same mortgage secured another note for $10,000. The mortgaged property was sold at the instance of the holder of the last mentioned note, and brought $20,000, which was paid to the sheriff, who released the whole mortgage. C, by proceeding against the sheriff for the amount of the $5,000 note, ratified the release of the mortgage, and having failed to obtain payment from the sheriff, sued B on his indorsement. Held, that C, by allowing the mortgage security to be lost, had destroyed B's right of subrogation thereto, and discharged him.[2] Principal and surety signed a bond and the principal and his wife, in order to secure the bond, mortgaged to the creditor their equitable life interest in certain real estate, the legal title to which was in trustees. The creditor assigned the bond, and neither he nor his assignee gave notice of

[1] City Bank *v.* Young, 43 New Hamp. 457, per Bellows, J. To contrary effect, see Freaner *v.* Yingling, 37 Md. 491.

[2] Merchants Bank *v.* Cordevoille, 4 Robinson (La.) 506. See, also, Bank of Gettysburg *v.* Thompson, 3 Grant's Cases (Pa.) 114.

the mortgage to the trustees holding the legal title to the life interest, who sold the same and divided the proceeds among the parties interested, and the life interest was lost as a security. Held, the surety was discharged by the neglect of the creditor to give notice of the mortgage. The court said: "It is perfectly established in this court that if, through any neglect on the part of the creditor, a security, to the benefit of which a surety is entitled, is lost or not properly perfected, the surety is discharged."[1] Execution against principal and surety was levied on property of the principal, which was in the hands of the surety for his indemnity, and sufficient to pay the debt. The officer exposed the property for sale, but found no bidders, and without direction from the creditor, left the property in the hands of the principal, and it was lost. Held, that after the property had been levied on, it was the duty of the creditor or of the officer, to see that it was taken care of and the surety was discharged.[2] Plaintiffs lent to P 300*l.*, for which A became surety. At the same time P, by deed, dated August 25th, 1870, assigned certain fixtures, etc., as security for the debt. The assignment provided for the repayment of the loan August 25th, 1871, and for the payment of interest February 25th, 1871, and P was to remain in possession till default. The assignment was not recorded, P did not pay the interest due February 25th, and the plaintiffs did not take possession. P became bankrupt, and the trustee in bankruptcy seized and sold the assigned goods, and they were lost as security. Held, A was discharged *pro tanto* both by the negligence of the plaintiffs to record the deed, and their failure to take possession upon the default in the payment of interest, they knowing that P was in embarrassed circumstances. The principle is fully held that the negligence of the creditor, in permitting securities to be lost which he should hand over to the surety upon payment of the debt, discharges the surety.[3]

§ 387. **Instances of discharge of surety by neglect of creditor to preserve or perfect securities.**—If, through any neglect of the creditor, a security to the benefit of which the surety is entitled is lost or not properly perfected, the surety is discharged to the extent that he is injured thereby. Thus, judgment having

[1] Strange *v.* Fooks, 4 Giffard, 408, per Sir John Stuart, V. C.

[2] Sherraden *v.* Parker, 24 Iowa, 28.

[3] Wulff *v.* Jay, Law Rep. 7 Queen's B. 756.

been obtained against A, he appealed to the Supreme Court, giving B as the surety on the appeal bond. Pending the appeal, A died, and the creditor failed to make his widow a party to the appeal, and consequently recourse against one-half of A's estate, which was solvent, was lost. The judgment of the court below was a lien on A's estate when the appeal was taken, but such lien on one-half of the estate was lost by the failure of the creditor to make the widow a party to the appeal. Held, B was discharged to the extent that he was injured. The court said: "It would seem to be a necessary consequence of the principles of the law of suretyship that the surety is entitled to the benefit of all the securities in the hands of the creditor; and if any of them are lost by his willful neglect or want of due diligence, the surety is to that extent discharged. * By Article 3030 of the Code, the surety is discharged when by the act of the creditor the subrogation to his rights, mortgages and privilege can no longer be operated in favor of the surety. Article 2037 of the Napoleon Code, is to the same effect; and the Court of Cessation has more than once decided that the term act of the creditor applied to omissions or neglects of the creditor, and consisted *in omittendo*, as well as *in committendo*."[1] A principal died, and auditors were appointed to marshal the money arising from a sale of his real estate. Judgment had been obtained against him and a surety by a bank, and the money aforesaid was "subject and liable to the judgment of the bank, and would have been obtained if due diligence had been used. * Here, to be sure, the bank had not the balance actually in their hands, nor did they actually assent to its passing into the hands of * (the principal) but they might, by using due diligence and doing their duty to the surety, have obtained it, and thus have had satisfaction *pro tanto* on their judgment from the proceeds of the real estate of the real debtor, and it was their duty to have done this. * The principal could not take it out of court, but the bank could have done so, and if they did not they must lose it, for, having had the means of payment in their power, they could not pass them by and recover from a surety."[2] A being the maker of a note held by C, upon which B was surety, died, and his administrator having suggested the

[1] Saulet v. Trepagnier, 2 La. An. 427, per Eustis, C. J.

[2] Ramsey v. Westmoreland Bank, 2 Pen. & Watts (Pa.) 203, per Smith, J.

insolvency of his estate, filed a bill in the chancery court to remove the administration thither, and to have a sufficiency of A's lands sold to pay his debts. An order was made and published, requiring creditors to file their claims, and thereupon C filed the note with the clerk and master. A portion of the land was sold under a decree, and a fund sufficient to pay all the debts was collected before the civil war in the United States. C did not demand payment of the clerk, and nothing was paid on the note, and after the war he sued the surety. It did not appear what had become of the money in the clerk's hands. Held, the surety was discharged. The court said that by filing his claim in the chancery proceeding, C signified his intention to obtain payment from the real estate, and could not afterwards remain passive. Having filed his claim it was his duty to apply for payment. The payment of the money into court was under the circumstances, a discharge of the surety. The surety is entitled to the benefit of all securities held by the creditor, "and if the creditor who has or ought to have had them in his full possession or power, loses them or permits them to get into the possession of the debtor, the surety will, to the extent of such security, be discharged." [1] By articles of agreement, H contracted with W to complete certain fittings for a warehouse for 3,450*l.* to be paid by instalments during the progress of the work. The contract contained a stipulation, "that W shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished, from the amount of the contract." A became surety for the due performance of the work by H. Fittings worth 2,300*l.* were destroyed without insurance, and H became insolvent and failed to complete the contract. Held, that A was discharged by the failure of W to insure the fittings.[2] This judgment was, upon appeal, affirmed by the Exchequer Chamber, and the court there held, that as the surety had agreed to become responsible for an insured principal and not an uninsured one, he was not discharged simply to the extent that he was injured, as in the case where a security is lost, but the contract is not changed, but he was wholly discharged, as in the case where

[1] Gillespie *v.* Darwin, 6 Heisk. (Tenn.) 21, per Nelson, J.

[2] Watts *v.* Shuttleworth, 5 Hurl. & Nor. 235.

time is given, or any material alteration in the contract is made.[1]

§ 388. **When surety discharged by negligence of creditor in prosecuting suit or judgment against principal.**—A verdict was recovered against a principal and two sureties in 1868, but no judgment was entered thereon. In 1874 the plaintiff moved to enter judgment thereon *nunc pro tunc*. In 1868 the principal was solvent, and if judgment had been then entered, it could have been collected of him, but he had since become insolvent: Held, this was an act of the creditor which injured the surety, and exposed him to greater risk, and discharged him under the Code which provided that any act of the creditor which injured the surety or increased his risk, or exposed him to greater liability, should discharge him. The negligence of the creditor was considered his act.[2] Where, in a suit on a contract made with the commissioners of a district of a parish, acting under an ordinance of the police jury for the erection of certain levees, the evidence showed that the contractor did not contemplate that the parish should be responsible in the first instance for the cost of the levees; and the failure to obtain payment from the source originally contemplated, was attributable to the creditor, who attempted to collect the money from the parties primarily liable, and could certainly have done so, but did not pursue the proper course: It was held that the parish was discharged from liability by such negligence of the creditor.[3] A as principal, and B as surety, were bound to C for 1,000*l*. A, desiring a further advance of 300*l*., and getting it from C, gave C a warrant of attorney to confess judgment for 2,600*l*., to secure both sums, and it was at the same time agreed between B and C that when C was requested by B, he should enter up judgment on the warrant of attorney, and levy execution on A's property. B notified C to enter up judgment, which he did, and levied on A's property, but neglected to file the warrant of attorney or affidavit of the execution, and by such neglect the property levied on was lost as a security. It was held that B was thereby discharged. The court said: "I think that * (C) having entered into a stipulation with the surety that he should have the benefit of this security, were bound

[1] Watts *v.* Shuttleworth, 7 Hurl. & Nor. 353.

[2] Hayes *v.* Little, 52 Ga. 555.

[3] Slattery *v.* Police Jury, 2 La. Ap. 444. See, also, on this subject, Clopton *v.* Spratt, 52 Miss. 251.

to do what was necessary to keep it effectual. It is by their omission that the benefit of the security has been lost, and I must, therefore, hold that the surety is discharged."[1]

§ 389. **When surety discharged by neglect of creditor to record mortgage for security of the debt.** — If the creditor has a mortgage or other conveyance of property of the principal as a security for the debt, and neglects to record the same, and the property is consequently lost as security, this is such negligence on his part as will discharge the surety to the extent that he is injured thereby. Thus, where a principal gave the creditor a chattel mortgage on property sufficient to pay the debt, which the creditor failed to record, and in consequence the property was lost as security, it was held the surety was thereby discharged. The court said: "Had the principal debtor pledged to the creditor his gold watch, and the creditor afterwards allowed the debtor the use of it, and the latter had sold it to an innocent third party, there can be no question but that a surety could avail himself of such wrongful treatment of the pledge by the creditor. * Wherein does the case before us differ from the illustration just made? In the latter case the wrong consists in doing something —passing the pledge back to the debtor; in the former the wrong arises from the plaintiff's omission to do something—the simple act of filing and having the mortgage recorded. And it is just behind this distinction, between doing something and omitting to do something, that the plaintiff seeks to shield himself. It is true, the books speak of the creditor being under no obligation to exercise active diligence for the protection of the surety as

[1] Watson *v.* Alcock, 1 Smale & Giffard, 319, per Sir John Stuart, V. C. Affirmed on appeal, Watson *v.* Alcock, 4 De Gex. Macn. & Gor. 242. Holding that a judgment creditor who omits to have his judgment on a forthcoming bond enrolled, and thereby lets in junior judgment creditors, who sweep away all the principal's property, does not thereby discharge the surety; see Pickens *v.* Finney, 12 Smedes & Mar. (Miss.) 468; McGee *v.* Metcalf, 12 Smedes & Mar. (Miss.) 535. For other cases holding the surety discharged by negligence of the creditor in not perfecting, or in losing securities, see *Ex parte* Mure, 2 Cox, 63; Goodloe *v.* Clay, 6 B. Mon. (Ky.) 236; Succession of Pratt, 16 La. An. 357; Steele *v.* Mealing, 24 Ala. 285; Hill *v.* Sewell, 27 Ark. 15; Miller *v.* Berkey, 27 Pa. St. 317; Chichester *v.* Mason, 7 Leigh (Va.) 244. Holding that a lessening in the value of securities by the mere passive delay of creditor to enforce them where none of the securities are lost, does not discharge the surety, see Clopton *v.* Spratt, 52 Miss. 251.

long as the surety himself remains inactive, and that to discharge the surety the creditor must be guilty of some wrongful act, as by a release or fraudulent surrender of the pledge." The cases holding this doctrine are mostly cases which decide that the creditor is not bound to enforce and realize upon securities held by him before proceeding against the surety. "But it is one thing to convert the securities given by the debtor into money, that they may be applied to satisfy the debt of the principal debtor, and quite another to preserve such securities that they may be made so available. While the creditor may be relieved from the former, he should be held responsible for the loss of any security arising from his wrongful acts, either of omission or commission * Can he who has taken the security stop short and omit to do that which renders it chiefly valuable, under the excuse that others did not urge him to file it or furnish the pittance necessary to pay the recorder."[1] In a similar case, where the same thing was held, the court said: "An act of omission on the part of the creditor, when the law requires him to act, may be quite as potent for mischief to the security as an act of commission."[2] In the case of a mortgage of real estate, where the creditor had failed to record it, and the surety was held to be thereby discharged, the court said: "Nor can it be gainsaid that where the creditor who has the securities, suffers them by his laches to become valueless, he is in no better condition than if he had released that security."[3] In a leading case on this subject, A became surety for B in a bond conditioned for the payment of an annuity to C. Various securities for the annuity were put up by B, and among them he assigned two ships to C. The assignment was not recorded, as required by the ship registry acts, and B afterwards sold the ships and became insolvent, and the ships were lost as a security. Held, that C, by his neglect to record the assignment, discharged A to the extent of the value of the two ships.[4] But where a rule of court provided that a recognizance for the payment of the rent of prop-

[1] Burr *v.* Boyer, 2 Nebraska, 265, per Cronuse, J. To similar effect, see Wulff *v.* Jay, Law Rep. 7 Queen's B. 756; see, also, Straton *v.* Rastall, 2 Durn. & East, 366; *contra*, Philbrooks *v.* McEwen 29 Ind. 347.

[2] Toomer *v.* Dickerson, 37 Ga. 428.

[3] Teaff *v.* Ross, 1 Ohio St. 469, per Thurman, J. *Contra*, Lang *v.* Brevard, 3 Strob. Eq. (So. Car.) 59; Hampton *v.* Levy, 1 McCord Eq. (So. Car.) 107.

[4] Capel *v.* Butler, 2 Simons & Stuart, 457.

erty in charge of the court should be recorded, and a lien on property of a lessee was lost by the failure of the clerk of the court to record such a recognizance, it was held, a surety for the rent was not thereby discharged, on the ground that the rule of court was not made for the benefit of sureties, and that the owners of the property should not be prejudiced by the negligence of the officers of the court.[1]

§ 390. **Cases holding surety not discharged by negligence of creditor.**—The distinction between the cases where the creditor is bound to active diligence and those where he may remain passive, is often extremely fine. As instances of the latter, the following may be mentioned: Principal and surety executed a note due in a year. At the same time the principal assigned to the creditor, as collateral security, a bond and mortgage, due after the note. The note was not paid, and the creditor did not proceed to foreclose the mortgage till more than two years after it was due, and then commenced foreclosure proceedings, and discontinued them. If he had foreclosed the mortgage at maturity, and obtained a judgment for the balance due, it might have been collected from the maker of the mortgage, but he failed to do this till the mortgagor became insolvent. Held, the surety was not discharged. The court admitted that where property is pledged by the principal for the payment of the debt, and it is lost by the negligence of the creditor, the surety is discharged, but said this was not such a case. The note became due before the mortgage, and should have been paid by the surety at maturity. The only loss which arose was from not getting judgment against the mortgagor for the balance above the value of the mortgaged premises. It was simply a case of failure to prosecute, which did not discharge the surety.[2] It has been held that the negligence of a sheriff, in permitting property levied on by him to be destroyed by fire before a sale thereof, does not discharge a surety for the debt.[3] Where a creditor had a judgment, which was a lien on real estate of the principal, and execution was issued on the judgment, but not levied on the real estate because the creditor was afraid it would not sell, and that levying on it would prevent

[1] Jephson v. Maunsell, 10 Irish Eq. Rep. 38; affirmed, Jephson v. Maunsell, 10 Irish, Eq. Rep. 132.

[2] Schroepell v. Shaw, 3 New York, 446.

[3] Griff v. Steamboat Stacy, 12 La. An. 8.

the collection of the debt otherwise, and the lien was lost, but the creditor acted in good faith, it was held, the surety was not discharged.[1] A sold land to B and took his notes, with C as surety for the purchase price. A gave B a title bond for a deed, conditioned that the land should be conveyed in twelve months, and might have retained the legal title as security, but did not contemplate doing so, and there was no agreement that he should do so. More than twelve months after the date of the bond, A made B a deed for the land, and took back a mortgage upon the representation of B that he would sell the land and pay the debt, or would otherwise return the deed. A was induced by fraud not to record the mortgage, and the land was lost as security, but it was held that the surety was not thereby discharged.[2] Where a creditor was bound, if requested, to proceed and foreclose mortgages on the property of the principal, and such request was made, it was held that this did not impose upon him an absolute duty to enforce the securities without delay. It was only necessary that he should act in good faith, and be free from gross neglect. If he unreasonably delays or acts in bad faith, or is guilty of gross negligence, whereby the value of the securities is impaired, the sureties will be discharged *pro tanto*.[3]

§ 391. **Cases holding surety not discharged by negligence of creditor.**—A lessor permitted several months to elapse without proceeding against her tenants for the collection of rent, and when she commenced suit therefor, the effects upon which the law established a privilege in her favor, had been removed beyond her reach. Held, the surety for the rent was not thereby discharged.[4] Where a bond provided that the principal should account for and pay over from time to time all such tolls as he should collect, it was held that the sureties were not discharged by the laches of the obligees, in not examining his accounts for eight or nine years, and not calling upon him as soon as they might have done for sums in arrear, or unaccounted for.[5] Certain notes deposited for safe keeping with a bank were assigned by the creditor to the surety, for his indemnity. The bank did

[1] Farmers Bank of Canton *v.* Raynolds, 13 Ohio, 85.

[2] Coombs *v.* Parker, 17 Ohio, 289.

[3] Black River Bank *v.* Page, 44 New York, 453.

[4] Parker *v.* Alexander, 2 La. An. 188.

[5] Trent Navigation Co. *v.* Harley, 10 East, 34.

not cause them to be protested, so as to charge the indorsers, and it was held the surety was not thereby discharged. As the notes were deposited for safe keeping, and not for collection, the bank was under no obligation to do anything with them.[1] Where a statute required, and an order of court provided, that a mortgage should be taken for the purchase money of property sold at administrator's sale, and a surety became bound for the purchase money of property so sold, supposing that such mortgage would be taken, but no misrepresentation was made to him, and no mortgage was taken, it was held he was not discharged.[2]

§ 392. **Surety not discharged by failure of creditor to present claim against estate of deceased principal—Other cases.**—If the principal dies, and the creditor fails to present his claim against the principal's estate until all remedy against the estate is lost by reason of such delay, the surety is not thereby discharged, even though the estate was solvent, and the claim would have been paid if presented. The creditor is under no greater obligation to present his claim against the estate than he would have been to sue the principal if he had not died. It is a case of mere passive delay, unaccompanied by any trust. The discharge of the estate of the principal is not in such case the act of the principal, but is the act of the law.[3] It is no defense to the sureties on a county

[1] New Orleans Canal and Banking Co. v. Escoffie, 2 La. An. 830.

[2] Wornell v. Williams, 19 Texas, 180. Holding that the neglect of the creditor to make the money out of property of the principal levied on by attachment, will not release the surety after a judgment against him at law, see Herrick v. Orange Co. Bank, 27 Vt. 584. Holding that the neglect of the creditor in permitting the lien of a judgment against a principal to be lost by failing to revive and keep it alive, does not discharge the surety, see Mundorff v. Singer, 5 Watts (Pa.) 172. Holding that the surety is not discharged by the failure of the creditor to prosecute an appeal in a suit against the principal, see Terrell v. Townsend, 6 Texas, 149. Holding that a delay of the creditor for four years to levy an execution on real estate of the principal, does not discharge the surety, see Lumsden v. Leonard, 55 Ga. 374. See, also, on this subject, Morgan v. Coffman, 8 La. An. 56. Holding, that if a surety who is discharged afterwards with full knowledge of the facts promises to pay the debt, he is bound without any new consideration, see Bank at Decatur v. Johnson, 9 Ala. 621.

[3] Cain v. Bates, Admr. 35 Mo. 427; People v. White, 11 Ill. 341; Hathaway v. Davis, 33 Cal. 161; Minter v. Branch Bank at Mobile, 23 Ala. 762; Johnson v. Planters Bank, 4 Smedes & Mar. (Miss.)165; Hooks v. Branch Bank at Mobile, 8 Ala. 580; Cohea v. Commissioners, 7 Smedes & Mar. (Miss.) 437; Fetrow v. Wiseman, 40 Ind. 148; Sibley v. McAllister, 8 New Hamp.

collector's bond that they had no notice of the collector's default till more than three years after his death, when all remedy against his estate was barred by lapse of time.[1] Where a principal assigned all his property for the benefit of his creditors, and a creditor did not present his claim for payment to the assignee, it was held that the surety therefor was not discharged.[2] A made an assignment to B for the benefit of his creditors, and C became B's surety as such assignee. B realized enough from the assigned property to pay seventy-one cents on the dollar of A's debts. D, a creditor of A, did not present his claim to B for payment, and B having made an assignment for the benefit of his creditors, D failed to present his claims to B's assignee, and no part of it was paid by either assignee. Held, that C, as surety of B, was liable on his bond to D. It was a case of mere passive delay, which would not discharge a surety.[3]

389; Ray *v.* Brenner, 12 Kansas, 105; Vredenburgh *v.* Snyder, 6 Iowa (Clarke) 39; Mitchell *v.* Williamson, 6 Md. 210; Moore *v.* Gray, 26 Ohio St. 525; Villars *v.* Palmer, 67 Ill. 204; M'Broom *v.* The Governor, 6 Port. (Ala.) 32; Macdonald *v.* Bell, 3 Moore's Priv. Co. Cas. 315; Pearson *v.* Gayle, 11 Ala. 278; Ashby *v.* Johnston, 23 Ark. 163. To contrary effect, see Dorsey *v.* Wayman, 6 Gill. (Md.) 59.

[1] Parks *v.* The State, 7 Mo. 194.

[2] Dye *v.* Dye, 21 Ohio St. 86.

[3] Richards *v.* The Commonwealth, 40 Pa. St. 146.

CHAPTER XIX.

OF SURETIES ON OBLIGATIONS GIVEN IN THE COURSE OF THE ADMINISTRATION OF JUSTICE.

§ 393. **Surety on appeal bond—Judgment by another court—Judgment against one of two principals—Changing plaintiff, etc.** —Such cases relating to sureties on obligations given in the course of the administration of justice as do not more properly come under some other subdivision of this work, will now be noticed. Sureties on such obligations, like all other sureties, have a right to stand on the strict terms of their contract. An appeal bond from a judgment rendered by a justice of the peace, provided that, if the parties appealing should pay and satisfy whatever judgment might be rendered by the circuit court of Hancock county upon the dismissal or trial of the appeal, then the obligation should be void. The statutory form prescribed for appeal bonds was: "shall pay whatever judgment shall be rendered by the court upon dismissal or trial of said appeal." The venue in the case was changed from Hancock county to another county, and a judgment was there rendered against the party appealing. Held, the surety was not liable on the bond. The bond was binding on the surety so far as its terms went, but no further, and no judgment had been rendered by the circuit court of Hancock county. The court said that if the bond had been in statutory form, the surety would have been liable.[1] Judgment was rendered in the court of common pleas, and appeal bond with sureties was given to the "Supreme Court" of a county. The Supreme Court had before that time been abolished, and a "District Court" established in its stead. The case was heard in the District Court. Held, the surety in the appeal bond was not liable for any judgment rendered therein.[2] Judgment was recovered before a justice against A and B, who jointly appealed and gave an appeal bond with C as surety, which stated: "I promise and undertake that said appellants, if judgment be adjudged against them

[1] Sharp v. Bedell, 5 Gilman (Ill.) 88.

[2] Myres v. Parker, 6 Ohio St. 501.

on the appeal, will satisfy such judgment and costs," etc. Judgment in the court above having been rendered against A only, it was held that C was not liable therefor.[1] But it has been held, that the sureties on an undertaking in the usual form on an appeal from a judgment against two or more defendants severally liable, are bound, if the judgment is affirmed as to one of the defendants, although it is reversed as to the others. The court said it was the same as if each defendant had appealed separately, "and we are to construe the undertaking in reference to the character of the judgment it was given to secure."[2] A supersedeas bond was given to stay proceedings pending a writ of error. One person was erroneously joined as co-plaintiff in the writ, and having no interest in the proceedings, his name was stricken out in the Supreme Court after the bond was given. Held, that as the law permitting such amendment was known to the surety in the bond when he became bound, he must be held to have signed subject to all such contingencies, and he was not discharged by striking out the name.[3] But where the plaintiff in a case was changed after the surety in an appeal bond had become liable, it was held that such surety was not liable for any judgment which might thereafter be rendered in the case.[4]

§ 394. **Which set of sureties bound when there are two appeals in the same case.**—A judgment was rendered before a justice, from which the defendant appealed to the county court, and gave a bond with sureties. This judgment was affirmed in the county court and the defendant appealed to the Superior Court, giving a new bond with other sureties. The judgment was affirmed in the Superior Court, and it was held that the sureties in the first bond were liable therefor. The court said: "The surety for an appeal from a justice, is bound for the action and obliged to perform whatever judgment is obtained in it."[5] But in a similar case it was held that the execution of the latter bond

[1] Lang *v.* Pike, 27 Ohio St. 498. To similar effect, see Grieff *v.* Kirk, 17 La. An. 25; Shimer *v.* Hightshue, 7 Blackf. (Ind.) 238.

[2] Seacord *v.* Morgan, 3 Keyes (N. Y.) 636; *Id.* 4 Abb. Rep. Om. Cas. 172.

[3] Sherry *v.* State Bank, 6 Indiana 397.

[4] Phillips *v.* Wells, 2 Sneed (Tenn.) 154.

[5] Dolby *v.* Jones, 2 Dev. Law. (Nor. Car.) 109, per Hall, J. Holding that the taking of a bond by a circuit court as a substitute for an appeal bond given before a justice, does not discharge the sureties in the latter bond, see Ashby *v.* Sharp, 1 Littell (Ky.) 156.

operated as a discharge of the sureties on the former, on the ground that the second appeal extended the time of payment, and deprived the sureties on the first bond of forcing their principal to pay, and thereupon proceeding against him.[1] A defendant in the circuit court of the United States gave bond with surety, conditioned to keep and perform the final decree in the cause, and pay all sums which might therein and thereby be decreed to be paid by him. The circuit court rendered a final decree against him for damages and costs, from which he appealed to the Supreme Court of the United States, and gave bond with a different surety to pay all such costs as that court should decree to be paid to the plaintiff upon affirmance of the decree of the circuit court. The Supreme Court affirmed that decree with costs and interest, and pursuant to its mandate the circuit court decreed that its own former decree be affirmed with costs and interest, and that execution issue for the sum found due by that decree, with interest from its date, and for the further amount of the costs decreed by the Supreme Court, and the costs taxed in the circuit court upon the return of the mandate. Held, that this was the final decree in the case within the meaning of the first bond.[2]

§ 395. **When surety in appeal bond liable to former surety for the debt.**—If principal and surety are liable for a debt, and judgment is recovered against the principal, from which he appeals and gives an appeal bond with surety, the liability of such latter surety is a fund to which the original surety has a right to look for the payment of the debt, and if the creditor releases the surety in the appeal bond, he discharges the original surety to the extent that he is injured thereby.[3] Judgment was recovered against A, and he stayed the judgment, giving B as surety on the stay bond, which was conditioned for the absolute payment of the money on a certain day. An execution was issued against A and B on the stay bond, which might have been levied on property of A sufficient to satisfy it. While the execution was in the hands of the sheriff, A appealed the case to the Supreme court and gave an appeal bond with C as surety. Pending the appeal, A became insolvent. The judgment was affirmed, and B was compelled to

[1] Winston v. Rives, 4 Stew. & Port. (Ala.) 269. For dictum to same effect, see Justices v. Selman, 6 Ga. 432.

[2] Jordan v. Agawam Woolen Co., 106 Mass. 571.

[3] Barnes Mott, 64 New York, 397; Lewis v. Armstrong, 47 Ga. 289.

pay it. Held, he was entitled to subrogation to the creditor's rights against C, and might collect from C the money so paid from him.[1]

§ 396. **When surety on appeal bond not liable for debt—When liable for costs.**—The condition of a bond to prosecute an appeal in the nature of a writ of error, was as follows: "Now, if the said A, B and C shall well and truly prosecute said appeal with effect, or, in case of a failure therein, pay and satisfy all costs and damages that may be awarded against him for wrongfully prosecuting said appeal, then this obligation to be void." Held, the sureties were only bound for the damages and costs, and not for the principal debt, although the statute provided that in such cases the bond should be given for the payment of the debt.[2] The condition of an appeal bond from a justice was as follows: "to be void on condition that the said * (principal) doth prosecute an appeal, by him prayed and obtained, to the next circuit court." The principal prosecuted the appeal, but was defeated. Held, the surety was not liable for the judgment against the principal. The surety was only liable that the principal should prosecute, and he had done that.[3] A party about to commence a suit by capias, gave bond as required by statute, with a surety, binding the surety that the principal "should prosecute his suit with effect, or, in case of failure, pay the costs." The plaintiff recovered in the court below, but the judgment was reversed in the supreme court, and the surety on the above bond was sued for the costs of the supreme court. Held, he was not liable for such costs, nor for any costs except those in the court where the suit was commenced.[4] The bill of a complainant was dismissed in the court below, and he appealed to the supreme court, giving a bond with surety on such appeal. The judgment having been affirmed in the supreme court, it was held that the surety in the appeal bond was not liable for the costs in the court below.[5]

§ 397. **When surety in appeal bond discharged if his risk increased.**—A case was commenced before a justice in which judg-

[1] Kellar v. Williams, 10 Bush (Ky.) 216.

[2] Banks v. Brown, 4 Yerger (Tenn.) 198.

[3] Albertson v. McGee, 7 Yerg. (Tenn.) 106.

[4] Hawkins v. Thornton, 1 Yerger (Tenn.) 146.

[5] Terry v. Stukely, 3 Yerger (Tenn.) 506.

ment was recovered against the defendant, and he appealed to the circuit court. In the circuit court, the ad damnum was, by stipulation between the principal and creditor, increased to an amount beyond the jurisdiction of a justice. The case was afterwards tried and a judgment recovered against the defendant for an amount within the jurisdiction of a justice: Held, the sureties in the appeal bond were discharged. The court said if the ad damnum had been increased in a manner which the court might have ordered, without consent of parties, the sureties would not have been discharged, because that would have been a contingency which they should have contemplated. But their contract was *strictissimi juris*, and they were not bound by any unauthorized act of their principal.[1] Where a capias issued in a civil case by a justice of the peace, was defective in not stating the christian names of the plaintiffs, and a judgment was recovered before the justice, and an appeal taken, and the capias was amended in the court above by inserting said christian names, it was held the surety on the appeal bond was discharged by such amendment.[2] An appeal was taken from the court below to the court of appeals, and an appeal bond was given. Pending the appeal, by act of the legislature, the court of appeals was authorized to give damages to the extent of ten per cent. in appeal cases, and gave five per cent. damages in this case: Held, the sureties in the appeal bond were not discharged by the passage of the act. The court said the sureties' "contract was entered into subject to the power of the legislature to change the law in these respects, and * they are bound by the contract construed by the law as it exists at the time they are called upon to perform it. This class of cases has no analogy to those where parties have by their own acts changed their contract to the prejudice of a surety of one without his assent."[3]

§ 398. **Judgment against surety in appeal bond without suit.** —Where a statute so provides, the supreme court may give judgment against the sureties on the appeal bond at the same time the judgment appealed from is affirmed. "Taking the provisions of the statutes together, the appellant who desires a stay of execution pending an appeal, causes a supersedeas bond to be

[1] Evers *v.* Sager, 28 Mich. 47.

[2] Irwin *v.* Sanders, 5 Yerg. (Tenn.) 287.

[3] Horner *v.* Lyman, 4 Keyes (N. Y.) 237, per Grover, J. *Id.* 2 Abb. Rep. Om. Cas. 399.

executed, and the sureties on the bond become, in legal effect, parties to the suit, and agree that if the judgment be affirmed, judgment may be rendered against them for costs, damages and the amount of the judgment below, etc.; the statute authorizing this judgment being part of their contract as fully as if incorporated into the supersedeas bond." Although the sureties are new parties, the subject matter of the suit is the same, and the supreme court does not exercise original jurisdiction in rendering such judgment.[1]

§ 399. **When surety on appeal bond liable to suit, if execution against principal stayed.**—It has been held, that so long as there is an order of court in force staying execution on the judgment against a party who appealed from a lower court, the sureties on his appeal bond cannot be lawfully sued, the reason given being that if they were in such case liable to a suit, they would be in a worse position than their principal.[2] But where several sureties in an appeal bond agreed to pay a judgment which had been rendered in a district court of Montana Territory, if the same should be affirmed by the supreme court of the territory, it was held that such sureties were liable, and suit could be brought against them as soon as the judgment had been so affirmed, notwithstanding the fact that an appeal had been properly taken from the supreme court of the territory to the supreme court of the United States, and, that proceedings had been legally stayed on the judgment. They were bound by the terms of the bond.[3]

§ 400. **Liability of surety in appeal bond if judgment afterwards rendered by consent of principal, etc.**—It has been held that if the judgment appealed from is affirmed by agreement between the principal and creditor, the surety in the appeal bond is discharged, on the ground that if the "non-performance of the stipulated acts was occasioned by the conduct of the creditor, or was the result of an agreement between him and the principal obligor, the sureties are discharged."[4] Precisely the opposite has been held, on the ground that the necessary legal effect of the

[1] White *v.* Prigmore, 29 Ark. 208, per English, C. J.; Callahan *v.* Saleski, 29 Ark. 216. See, on this subject, *Ex parte* Miller, 1 Yerger, (Tenn.) 435.

[2] Parnell *v.* Hancock, 48 Cal. 452.

[3] Bullard *v.* Gilette, 1 Montana, 509.

[4] Johnson *v.* Flint, 34 Ala. 673, per Walker, J.

should prosecute his appeal and satisfy whatever judgment should be rendered against him. He did not prosecute his appeal, and for that reason no judgment was rendered against him in the court above. Held, the surety in the bond was liable, because no appeal had been prosecuted, and that was a breach of the bond.[1] An appeal was dismissed by the supreme court, because no transcript had been been filed. It was contended by the sureties on the appeal bond that the consideration of the bond had failed because no appeal had been taken. Held, an appeal had been taken and dismissed, and the sureties were liable.[2] An appeal bond provided that the appellant should prosecute his appeal and pay "whatever judgment" should be rendered against him. The judgment was in part reversed, and the supreme court rendered a judgment for part of the judgment below. Held, the sureties on the bond were liable for this judgment.[3] An appeal bond recited that the judgment below was for a smaller sum than the actual amount of the judgment. Held, the sureties on the bond were only liable for the sum recited as the amount of the judgment.[4] It is not necessary, in order to charge the sureties on an appeal bond, that an execution on the judgment appealed from should be issued against the principal.[5]

§ 405. **No defense to surety in forthcoming bond that property did not belong to principal.**—It is, as a general rule, no defense to the surety on a forthcoming bond that the property seized on legal process, as property of the principal, did not belong to him. With reference to this it has been said that it was not admissible for the principal "or his surety to get possession of the property by the execution of the bond, and then refuse to deliver it to answer the judgment of the court, according to the exigencies of the bond, because it belonged to a third person. What busi-

[1] Champomier v. Washington 2 La. An. 1013.

[2] Ellis v. Hull, 23 Cal. 160.

[3] Diamond v. Petit, 3 La. An. 37; Holmes v. Steamer Belle Air, 5 La. An. 523.

[4] Jenkins v. Skillern, 5 Yerger (Tenn.) 288.

[5] Anderson v. Sloan, 1 Colorado, 484. Holding that sureties who sign an appeal bond are liable, although their names do not appear in the body of it; see Cooke v. Crawford, 1 Texas, 9. Holding that a surety on an appeal bond is not liable for damages assessed on dismissing the appeal, see Raney v. Baron, Admr. 1 Fla. 327. Sureties for the payment of a judgment are not discharged by the fact that the judgment is appealed from, and other sureties given for the appeal; Smith v. Falconer, 11 Hun, (N. Y.) 481.

ness is it to them if it did belong to a third person? He alone could complain that his property had been taken to pay the debt of" the principal.[1] A steamer was sequestered and released on bond, which provided that the property should be returned or the judgment satisfied. In an action on the bond the sureties pleaded that subsequent to the sequestration the steamer had been seized and sold by another creditor, and the proceeds, with the knowledge of the plaintiff, had been paid into court, and distributed among the creditors. Held, these facts constituted no defense.[2] Certain property was sequestered by a vendor, who claimed a lien on it, and a sequestration bond for its release was given, which was conditioned for the production of the property to answer the judgment. The property was at that time subject to a lien for rent, and afterwards became subject to a further lien for rent. It was sold for these liens, and was not forthcoming to answer the judgment in the sequestration proceeding. Held, the sureties on the sequestration bond were liable for its non-production.[3] The death of a slave for which a delivery bond is given, will exonerate the surety when the bond is not otherwise forfeited.[4] A forthcoming bond, which is not good as a statutory obligation, may, if it violates no statute and does not contravene public policy, be good as a common law bond.[5]

§ 406. **Miscellaneous cases concerning sureties on forthcoming bonds.**—The obligation of a bond for the forthcoming of property seized on execution, is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied; and, therefore, if a surety on a forthcoming bond, before it is forfeited, discharges the execution by paying it without the request of the principal, such surety can-

[1] Gray v. MacLean, 17 Ill. 404, per Caton, J.; Syme v. Montague, 4 Hen. & Munf. (Va.) 180; Jemison v. Cozens, 3 Ala. 636; *contra*, Long v. United States Bank, 1 Freeman's Ch. R. (Miss.) 375. See, also, on this subject, Elliott v. Gray, 4 Stew. & Port. (Ala.) 168.

[2] Gordon v. Succession of Diggs, 9 La. An. 422.

[3] Clapp v. Seibrecht, 11 La. An. 528. The majority of the court relied considerably upon some equitable circumstances against the sureties, and two out of five judges dissented, holding that as the goods were sold for a prior lien, the sureties were discharged. Holding that the liability of a surety on a sequestration bond is only for such expenses as are incident to the sequestration and release; see Norton v. Cammack, 10 La. An. 10.

[4] Laughlin v. Ferguson, 6 Dana (Ky.) 111.

[5] Johnson v. Weatherwax, 9 Kansas, 75.

not maintain an action against the principal for money expended for the latter's use, though by payment of the execution the bond was satisfied. The principal may have intended to contest the validity of the execution or levy.[1] When a judgment is obtained against a principal and his sureties, and property of the principal is levied on for its discharge, a third person who becomes surety in a bond for the forthcoming of the property, and is obliged to pay the debt because of the non-production of the property, cannot recover contribution from the original sureties. They are not sureties in the same transaction; their interests are dissimilar, and they are not co-sureties.[2] Where two separate suits were brought, one against the maker and the other against the indorser of a promissory note, and judgments were had, and forthcoming bonds were given in each case, the bond in the case against the maker having been given and forfeited before that in the suit against the surety, it was held that the forfeiture of the bond given by the maker did not operate as a satisfaction of the judgment against the surety, inasmuch as the judgments were separate and in separate suits; but the court said it would have been otherwise if there had been a joint judgment against both.[3] Judgment was recovered against A, B and C, who were all principal debtors, and execution was levied on property of A, who gave a forthcoming bond therefor, with D as surety, which bond was forfeited and execution was issued against D. Held, the original debt was not extinguished by the levy, and giving the forthcoming bond. By signing the bond, D became a surety for the original debt, and if he paid it, might recover indemnity from B and C, but he could not recover from them the costs of the forthcoming bond. He would also be entitled to subrogation to all the rights of the creditor against B and C.[4] Sureties in a sequestration bond have been held to be proper parties defendant to a suit to recover damages for wrongfully suing out the writ.[5]

§ 407. **Liability of surety on bond given to dissolve attachment when defendants changed or judgment got against only**

[1] Gray *v.* Bowls, 1 Dev. & Batt. Law (Nor. Car.) 437.

[2] Dunlap *v.* Foster, 7 Ala. 734.

[3] McNutt *v.* Wilcox, 3 Howard (Miss.) 417.

[4] Robinson *v.* Sherman, 2 Gratt. (Va.) 178.

[5] Tompkins *v.* Toland, 46 Texas, 584.

part of defendants.—The surety in a bond given to dissolve an attachment is discharged, if the plaintiff afterwards discontinues as to one of the defendants, and brings in a new defendant without notice to the surety, although the defendant, as to whom the action was discontinued, was not a party to the bond. The court said: "The bond declared on is conditioned for the payment of the judgment which the plaintiff should recover in the original action. The judgment actually rendered was against a new party, and is entirely different from any which the surety had in view when he signed the bond."[1] The condition of a bond dissolving an attachment, was that if the defendants A, B and C "shall pay to the plaintiff in said action the amount, if any, which he shall recover therein within thirty days after the final judgment in said action, then," etc. Judgment was recovered against A and B only. Held, the surety in the bond was liable therefor. The court said it did not appear in the case whose property was attached, but the condition of the bond was to pay whatever judgment should be rendered in the case.[2] In another case certain property was attached at the suit of three persons. Certain parties, to procure the release of the attached property, gave a bond conditioned: "That if the obligors should well and truly pay any judgment which might be recovered by the said * (plaintiff) in the suit commenced by the writ of attachment within sixty days after the judgment was recovered," then the obligation to be void. The plaintiff dismissed the suit as to two of the parties, and recovered judgment against the third. Held, the sureties on the bond were not liable therefor. The court said that the bond when executed tacitly refers to the suit as it then is. "The sureties on entering into the contract measure the risk they incur by the chances which the plaintiff has to recover against the defendants in the writ, and the ability of the latter in case of defeat, to respond to the plaintiff or the sureties themselves if called on." The change in the parties allowed the creditor to recover when he would otherwise have been defeated. The sureties would have to look for indemnity to the parties

[1] Richards v. Storer, 114 Mass. 101, per Ames, C. J. To similar effect, see Tucker v. White, 5 Allen, 322. See, also, Quillen v. Arnold, 12 Nevada, 234.

[2] Leonard v. Speidel, 104 Mass. 356. To similer effect, see Heynemann v. Eder, 17 Cal. 433.

against whom the judgment was recovered, instead of all the defendants in the attachment suit, and he might be insolvent and the others good.[1]

§ 408. **When judgment against principal conclusive against surety on bond to dissolve attachment.**—An attachment was levied on the property of a defendant, and a bond with sureties to dissolve the attachment was given. Afterwards, and before judgment, the principal was adjudged bankrupt, and the creditor proved his claim against the bankrupt's estate. Afterwards judgment was recovered in the attachment suit. Held, these facts were no defense to the surety on the forthcoming bond, but should have been made use of to defeat the attachment suit. The judgment in that suit was, in the absence of fraud or collusion, conclusive evidence of the existence of the debt against both principal and surety.[2] Certain goods were seized on attachment as the property of A. Afterwards B, with C as surety, gave a bond for the goods, by which they agreed to satisfy whatever judgment might be rendered in the suit. Judgment having been rendered for the plaintiff in the suit, it was held that the surety in the bond might show as a defense that the property levied on was not the property of A, that no service actual or constructive had been had on A, and that consequently the judgment was a nullity.[3] Certain property was levied on by attachment, and sureties signed an obligation providing, that in consideration of the release of the property levied on, the obligors would pay whatever judgment might be rendered in the attachment suit. Judgment was recovered by the plaintiff in the attachment suit, and it was held that the sureties in the bond were liable therefor, and could not show that the property attached was not subject to attachment, nor that the writ of attachment was not properly issued. The court said: "It does not rest with the * (sureties) to say that the property attached, if any was, was not subject to levy, for the condition is to answer the judgment; and no collat-

[1] Andre *v.* Fitzhugh, 18 Mich. 93, per Graves, J. See, also, on this subject, Newell *v.* Norton, 3 Wallace, 257. Holding, that an alteration of the attachment writ discharges the surety on such a bond, see Simeon *v.* Cramm, 121 Mass. 492.

[2] Cutter *v.* Evans, 115 Mass. 27; see, also, on this subject, Collins *v.* Mitchell, 5 Fla. 364.

[3] Quine *v.* Mayers, 2 Robinson (La.) 510.

eral inquiry can be made as to the fact of the levy, or of the property being subject to it."[1]

§ 409. **How surety on bond to dissolve attachment and on appeal bond affected by bankruptcy of principal.**—It has been held, that a discharge in bankruptcy is a bar to the further prosecution of a suit against the bankrupt, commenced by attachment more than four months before the institution of the bankruptcy proceedings, if the attachment was dissolved by giving a bond with surety to pay whatever judgment might be recovered in the case, notwithstanding the provisions of the bankrupt act, preserving the lien of an attachment made four months or more before the commencement of bankruptcy proceedings, and continuing the liability of sureties after the discharge in bankruptcy of their principal. The obligation of the surety on such a bond never, in such case, becomes complete, because no judgment is rendered against the principal.[2] On the same principle it has been held that the surety on appeal bond is discharged by the discharge in bankruptcy of his principal, where no final judgment is, for that reason, rendered against the principal. Such a surety is not bound for the debt, but is only liable in case of the rendition of a judgment which never is rendered.[3]

§ 410. **Miscellaneous cases concerning sureties on bonds given in attachment proceedings.**—After the liability of the sureties on a bond given to dissolve an attachment has become fixed, they are not discharged, by the fact that the creditor has the principal arrested and imprisoned for the same debt.[4] It has been held that the surety in a void attachment bond is not liable for the wrongful taking of the property by the sheriff, where he has no personal share in such taking.[5] A attached the goods of B, and he gave bond, with C as surety, for the forthcoming of the goods to answer the attachment. Afterwards A and B agreed

[1] McMillan *v.* Dana, 18 Cal. 339.

[2] Carpenter *v.* Turrell, 100 Mass. 450; Hamilton *v.* Bryant, 114 Mass. 543; Braley *v.* Boomer, 116 Mass. 527; *In re* Richter's Estate, 4 Bankr. Reg. 222; Payne *v.* Able, 7 Bush. (Ky.) 344. To contrary effect, see Holyoke *v.* Adams, 1 Hun, (N. Y.) 223; *Id.* 10 Bankr. Reg. 270; Affirmed, Holyoke *v.* Adams, 59 New York, 233; *Id.* 13 Bankr. Reg. 414; *In re* Albrecht, 17 Bank. Reg. 287; Zollar *v.* Janvrin, 49 New Hamp. 114.

[3] Odell *v.* Wootten, 38 Ga. 224; *Id.* 4 Bankr. Reg. 183; Martin *v.* Kibourn, 1 Central Law Jour. 94; but see Knapp *v.* Anderson, 7 Hun, (N.Y.) 295; Hall *v.* Fowler, 6 Hill 630.

[4] Moore *v.* Loring, 106 Mass. 455.

[5] McDonald *v.* Fett, 49 Cal. 354.

among themselves that the debt sued for was just, and the attachment should be sustained. Held, that C might thereupon intervene in the suit, and move that the attachment be quashed, and that he was only liable for the forthcoming of the property, on condition that the attachment proceeding was legal and proper, and the property levied on was subject to attachment. The agreement between A and B did not bind C.[1] The removal of a cause from a state to a United States Court, in accordance with the act of congress, does not of itself alone have the effect to render a delivery bond for property seized on attachment and already filed in the cause, inoperative; neither does such removal so change or enlarge the obligation of the sureties on such bond as to discharge them. But where, in pursuance of an order of the state court, a new forthcoming bond is filed in the United States Court, and the first bond is delivered up to the sureties therein, and by them canceled, such sureties are discharged.[2] A bond given to procure the issuing of an attachment, provided that the plaintiff would pay all damages which the defendant might sustain. Held, the sureties on such bond were only liable to pay in case the principal did not. They were in the nature of guarantors, and "a demand on the principal debtor, and a failure on his part to do that which he is bound to do, are requisite to found any claim against the guarantor."[3]

§ 411. **Surety on injunction bond not liable for judgment if it is misdescribed.**—In a suit against a surety on an injunction bond conditioned for the payment of all moneys due, or to become due, upon a judgment "for the sum of $2,300 and costs," in favor of the obligee and against the principal, in case the injunction should be dissolved, it was held that the plaintiff could not give in evidence a judgment for $2,346.06 and costs, although in other respects it answered to the judgment mentioned in the condition of the bond.[4] If, however, the bond contains a plain reference to the bill in the suit in which the injunction is issued, the misdescription of the judgment in the bond may be corrected by the bill, and the surety held liable.[5] Where the judgment recited in an injunction bond was stated to have been recovered

[1] Burch v. Watts, 37 Texas, 135.

[2] Ramsey v. Coolbaugh, 13 Iowa, 164.

[3] Pinney v. Hershfield, 1 Montana, 367, per Knowles, J.

[4] Hall v. Williamson's Admr. 9 Ohio St. 17.

[5] Williamson's Admr. v. Hall, 1 Ohio St. 190.

at the April term, 1801, when it was in fact recovered at the September term, 1801, it was held the surety on the bond was not liable therefor.[1]

§ 412. **Liability of surety on injunction bond for judgment, for damages, for interest, etc.**—An injunction bond in a suit to stay a judgment at law, provided for the payment of all costs and damages in case the injunction should be dissolved. The statute provided that the bond in such case should be conditioned for the payment of the judgment at law. Held, the sureties in the bond were only bound for the costs and damages in the injunction suit, and not for the payment of the judgment.[2] The surety in an injunction bond has been held not liable for damages allowed upon the affirmance of a decree, in pursuance of a statute passed after he signed the bond.[3] Where an injunction bond, in a suit to stay certain judgments at law, provided for the payment of "the said sums of money in said judgments specified," and the amounts of the judgments were specified, it was held the surety on the bond was liable for interest on the judgments.[4] A having procured an order dissolving an injunction which had issued in favor of B, the latter appealed to the supreme court from the order, which appeal the supreme court dismissed, on the ground that an appeal did not lie in such a case. Held, the sureties on the appeal bond were not liable for the damages occasioned by the issuing of the injunction, but only for the costs of the appeal.[5]

§ 413. **Liability of surety in injunction bond if complainant dismiss his bill by agreement with defendant.**—Certain parties became sureties in an injunction bond, given in a suit to stay a judgment at law. The principal in the injunction suit dismissed his bill by agreement with the owner of the judgment. Held, that in the absence of fraud and collusion by the principal and the creditor to charge the sureties, the mere dismissing the injunction suit by consent, did not discharge the sureties on the injunction bond. The court said that the surety, by his undertaking, "put himself in the power of his principal so far as the prosecution of the bill was concerned. He knew perfectly well that the com-

[1] Morgan v. Blackiston, 5 Harr. & Johns. (Md.) 61.

[2] Ashby v. Tureman, 3 Littell (Ky.) 6.

[3] Woodson v. Johns. 3 Munf. (Va.) 230.

[4] Weatherby v. Shackleford, 37 Miss. 559.

[5] Parham v. Cobb, 9 La. An. 423.

plainant had power at any time, in his discretion, to dismiss his bill. He knew the court could dismiss it for reasons shown, and he took these risks."[1] But if the complainant in a bill upon which an injunction has been granted, is corruptly induced by the defendant in the suit to dismiss his bill for the purpose of charging the sureties on the injunction bond, they will be thereby discharged.[2]

§ 414. **Liability of surety in injunction bond when one only of several for whom he is liable is charged.**—A and B were enjoined by C, who gave bond with D as surety, conditioned to indemnify A and B against all such costs and damages as should be awarded against C in case the injunction should be dissolved. It was dissolved as to A, but not as to B. Held, D was not liable on his bond. The injunction had not been dissolved so as to charge him.[3] It has been held that the undertaking of the surety in an injunction bond, where there are several complainants, is, in law, for the principals severally as well as jointly, and the abatement, therefore, of a suit in equity as to one of several joint complainants by the neglect of both parties to revive it, or the discharge of one upon some ground applicable to him alone, does not affect the liability of the surety in an injunction bond for the surviving party or parties against whom a final decree may have been properly rendered.[4]

§ 415. **Miscellaneous cases concerning sureties in injunction bonds.**—A single complainant filed a creditor's bill on behalf of himself and all other creditors of the defendant, who should come in and contribute to the expenses of the suit. He also procured the issuing of an injunction against the defendant, to prevent him from disposing of his property, giving an injunction bond with surety. Afterwards other creditors became parties, and joined in the prosecution of the case. Held, the surety in the injunction bond was not discharged by the addition of the new parties. The court said that while the courts will not extend the obligation of a surety, "it is equally settled that the intention of the parties when the bond was executed, is to guide in its construction, and to arrive at this, the nature of the contract, the purposes to be accomplished by it, and the character of the proceedings of which it forms a part, will be regarded." In this case the bond was

[1] Boynton v. Phelps, 52 Ill. 210, per Breese, C. J.

[2] Boynton v. Robb, 22 Ill. 525.

[3] Ovington v. Smith, 78 Ill. 250.

[4] Kelly v. Gordon, 3 Head (Tenn.) 683.

given as a necessary step to procure the injunction. "The condition of the bond was co-extensive with the objects and purposes of the bill, and the admission of new parties did not enlarge the responsibility of the obligors." Moreover, it was contemplated when the bond was executed that new parties would come in.[1] A principal debtor in a judgment obtains an injunction against the enforcement of the same, and executes an injunction bond, with a third person as surety, an original surety for the debt not being a party to the injunction proceedings. Upon a dissolution of the injunction, the surety in the injunction bond is liable for the debt enjoined before the original surety.[2] The surety in an injunction bond given in a suit to stay a judgment at law, cannot in the absence of fraud inquire into the merits of the judgment against his principal.[3] It is no defense to the sureties on an injunction bond, that the principal is solvent and able to pay.[4] If the word "dollars" is left out of an injunction bond where it should occur, it has, notwithstanding, been held that the sureties in the bond are liable thereon.[5]

§ 416. **When surety in replevin bond discharged by reference of replevin suit to arbitrators.**—The condition of a replevin bond was that the plaintiff in replevin should "appear at the next county court and prosecute his suit with effect and without delay * and make return * if return thereof" should be adjudged. The plaintiff and defendant in the replevin suit referred the cause to an arbitrator, and agreed without the privity of the sureties that the replevin bond should stand as security for the performance of the award. Held, the sureties in the replevin bond were discharged on the ground that time had been given the principal.[6] It has been held that where the matters in issue in a replevin suit are referred to arbitrators unconditionally, it operates to discontinue the suit and discharges the sureties in the replevin bond, but when the submission provides that the award

[1] Levy v. Taylor, 24 Md. 282, per Weisel, J.

[2] Bently v. Harris's Admr. 2 Gratt. (Va.) 357.

[3] McBroom v. Sommerville, 2 Stew. (Ala.) 515.

[4] Hunt v. Burton, 18 Ark. 188.

[5] Harman v. Howe, 27 Gratt. (Va.) 676.

[6] Archer v. Hale, 4 Bingham, 464; *Id.* 1 Moore & Payne, 285; Bowmaker v. Moore, 3 Price, 214; Bowmaker v. Moore, 7 Price, 223. *Contra*, Moore v. Bowmaker, 2 Marshall 81; Moore v. Bowmaker, 2 Marshall 392; Moore v. Bowmaker, 6 Taunt. 379. Holding that in such case the surety is discharged in equity, but not at law; see Aldridge v. Harper, 10 Bingham, 118.

is exonerated from all obligation to return the slaves if they are emancipated by act of the law.[1]

§ 420. **Miscellaneous cases concerning sureties in replevin bond.**—Where logs which A had contracted to deliver to B at a certain time, were seized before that time in a replevin suit brought by C, and B became the surety on C's bond in the replevin suit, it was held that the delivery of the logs as agreed was prevented by the act of B, and he could not claim such delivery from A until the replevin suit was determined.[2] Certain sureties signed a replevin bond, which provided that the property should be delivered to the defendant in replevin if return should be awarded to him. The defendant in replevin did not claim a return of the property in his pleadings. The jury found generally for the defendant in replevin, and the court rendered a judgment for costs against the plaintiff in replevin, which judgment was paid. Held, this was a full satisfaction of the replevin bond, and a suit for the value of the property could not be maintained against the sureties.[3] Where, in an action of replevin, a judgment for the return of the property has been entered, an action may be brought against the sureties in the replevin bond without a demand for the return of the property.[4] An action of replevin was brought for a horse, and sureties entered into an undertaking to deliver the horse if the plaintiffs should recover. The plaintiff did recover a judgment for the delivery of the horse and for damages, and without issuing execution against the defendant in replevin, brought suit on the undertaking of the sureties. Held, the suit could be maintained.[5]

§ 421. **Liability of surety on stay bond.**—A judgment against a principal debtor was replevied (stayed) by him, and paid by his

[1] Young v. Pickens, 45 Miss. 553.

[2] Ketchum v. Zeilsdorff, 26 Wis. 514.

[3] Chambers v. Waters, 7 Cal. 390.]

[4] Lomme v. Sweeney, 1 Montana, 584.

[5] Nickerson v. Chatterton, 7 Cal. 568. Holding that when a statute requires two sureties on a replevin bond, and the name of one of two apparent sureties to such a bond is forged, the other is liable, see Bigelow v. Comegys, 5 Ohio St. 256. Holding that where a surety signs a replevin bond, he is liable, although his name is not contained in the body of it, see Clarke v. Bell, 2 Littell (Ky.) 164. Holding that sureties in a replevin bond are not discharged because they are excepted to, and do not justify, see Decker v. Anderson, 39 Barb. (N. Y.) 346. See, also, Crawford v. Collins, 45 Barb. (N. Y.) 269. Holding that the release of the principal in a replevin bond discharges the surety therein, Greenlee v. Lowing, 35 Mich. 63.

sureties in the replevin bond: Held, a surety for the original debt was not responsible to the sureties in the replevin bond.[1] In order to dissolve an attachment, A became surety that the judgment should be paid. Judgment was recovered and execution issued, and the defendant replevied (stayed) the execution, giving a replevin bond: Held, that replevying the execution extinguished the judgment and discharged A.[2] Consent by a surety in a replevin (stay) bond, that an execution then in the hands of the sheriff on the replevin bond may be stayed for any period of time which the plaintiff may direct, does not have the effect of waiving the bar of the statute of limitations, providing that if execution is not issued within one year, the surety shall be discharged.[3] Where a judgment has been rendered for too much, and it is stayed by the principal and a surety, entering into a stay bond, and afterwards by agreement of the creditor in one instance, and by the court (it not appearing whether the creditor agreed or not) in another instance, the judgment stayed was modified so as to allow junior liens to take precedence of the judgment; the surety on the stay bond was held to be released *pro tanto*. The judgment was no longer the one which the surety agreed to stay.[4]

§ 422. **Liability of surety for costs—Special instances.**—A *certiorari* bond was conditioned for the payment of "all such costs and damages as may be awarded by the court on failure to prosecute," and concluded: "We agree to pay all costs aforesaid, on failure aforesaid." Held, the sureties were only liable for the costs, and not for the amount of the recovery.[5] A party entered into a recognizance in a court below as surety, which provided that the plaintiff should prosecute his suit with effect, and answer all damages in case he should not make his suit good. Before the suit was terminated the plaintiff died, and judgment was afterwards rendered in the case against the plaintiff for costs. Held, the surety was not liable for the costs made before the plaintiff's death, nor for any costs. No costs could be legally adjudged against the plaintiff, because he died before the termi-

[1] Hammock *v.* Baker, 3 Bush (Ky.) 208. To same effect, with reference to sureties in first and second replevin bond for same debt, see Brooks *v.* Shepherd, 4 Bibb (Ky.) 572.

[2] Gray *v.* Merrill, 11 Bush (Ky.) 633.

[3] McCauley *v.* Offutt, 12 B. Mon. (Ky.) 386.

[4] Middleton *v.* First Natl. Bank of Marshalltown, 40 Iowa, 29.

[5] Maxwell *v.* Salts, 4 Cold. (Tenn.) 233.

nation of the suit, and if the principal was liable for no costs, the surety was liable for none.[1]

§ 423. **Surety in indemnifying bond to sheriff liable with sheriff in trespass.**—On an execution against A, property of B was levied on. The sheriff refused to sell without a bond of indemnity, and C signed such a bond and the property was sold. Held, that C was jointly liable in trespass to B with the plaintiff in the execution. The court said: "The indemnitors were the *causa causans* inducing and requesting the sheriff to do the unlawful act. Their indemnity naturally produced the act of the wrongful sale, and must be regarded as the principal, if not the sole, cause of it. All persons who direct or request another to commit a trespass, are liable as co-trespassers. The bonds of indemnity in this case were a virtual request to the sheriff to sell the safe."[2] But it has been held that the surety in a void attachment bond, who had no personal share in taking the property, is not liable in trespass for the taking thereof.[3]

§ 424. **Miscellaneous cases concerning sureties on bonds given in the course of the administration of justice.**—Where a complainant in chancery obtained the appointment of a receiver to take charge of the property in controversy, and executed a bond conditioned to pay "all damages and costs which may be awarded" to respondents by reason of the wrongful appointment of such receiver, it was held that it was not necessary before bringing suit on the bond, that the plaintiff should have his damages awarded him, either at the time of the determination of the original suit, or by the institution of a suit against the principal alone.[4] The surety for the appearance of a party attached for contempt of court is discharged if the proceedings against the principal are discontinued, even though they are subsequently revived.[5] A prosecution bond was given with surety, which was objected to by the defendant in the suit, and a new bond with another surety was given. Held, this did not discharge the surety in the first bond. The second bond was supplemental to the first, and the sureties on both were liable.[6]

[1] Parsons *v.* Williams, 9 Ct. 236.

[2] Herring *v.* Hoppock, 15 New York, 409, per Paige, J.; Screws *v.* Watson, 48 Ala. 628.

[3] McDonald *v.* Fett, 49 Cal. 354.

[4] Thayer *v.* Hurlburt, 5 Iowa (Clarke) 521.

[5] Lamonte *v.* Ward, 36 Wis. 558.

[6] Buie *v.* Wooten, 7 Jones Law (Nor. Car.) 441.

CHAPTER XX.

OF BAIL.

§ 425. **Bail in a civil case generally entitled to the rights of a surety.**—Bail is a word used to designate the person or persons who become responsible for the future appearance of an individual, and thereby procure his release from present imprisonment. No general discussion of the subject of bail will be here attempted. Attention will be directed only to such portion thereof as especially concerns the subjects treated of in this work. Though nothing passes between the bail and the creditor in a civil case, yet such bail are considered by act and operation of law as sureties, and are entitled to the benefit of the general principles relative to sureties as applicable to them.[1] Such bail

[1] Rathbone *v.* Warren, 10 Johns. 587; Campau *v.* Seeley 30 Mich. 57; West *v.* Ashdown, 1 Bingham, 164.

are generally discharged by the giving of time to the principal, under the same circumstances that sureties directly liable for the debt would be discharged.[1] Judgment having been entered against the defendant in a case who had given special bail, the creditor afterwards, without the consent of the bail, entered into a binding agreement that he would not issue execution against the principal, for the purpose of fixing the bail, until after a certain day. Held, that the bail was thereby discharged, as he was deprived of the right to surrender the principal.[2] But where a defendant was arrested on mesne process and gave bail, and the plaintiff before judgment was rendered covenanted not to arrest him on any writ or execution within four months, it was held that the bail was not thereby discharged, because the agreement to give time could not be specifically enforced; the bail might at any time have arrested the principal, and no judgment could have been obtained within the extended period, if the agreement for extension had not been made.[3] So, where the plaintiff, during the progress of a cause, agreed to give the defendant a month's time to pay the debt, the time expiring before judgment could, by the practice of the court, be obtained, and final judgment not having been in fact signed before the agreement was made, it was held that the bail was not thereby discharged.[4] It has been held that a plaintiff who, having sued out a *ca. sa.* against the principal, offered to accept a composition, and gave him time to make terms with his other creditors, did not thereby (the composition having failed) discharge the bail, who might at any time have surrendered his principal.[5] It has also been held that a temporary stay of execution, entered of record by agreement of the plaintiff, in consideration of a confession of judgment by the principal, will not exonerate the special bail in the action. The stay did not suspend the right of the bail to surrender the principal at any time.[6] Bail for the appearance of the principal, to take the benefit of the insolvent laws, is discharged if the creditor releases

[1] Willison *v.* Whitaker, 7 Taunton, 53; *Id.* 2 Marshall, 383; Croft *v.* Johnson, 5 Taunton, 319. Holding bail discharged by taking new bond for extended time under peculiar circumstances, see Crutcher *v.* Commonwealth, 6 Wharton (Pa.) 340.

[2] Rathbone *v.* Warren, 10 Johns. 587.

[3] Fullam *v.* Valentine, 11 Pick. 156.

[4] Whitfield *v.* Hodges, 1 Mees. & Wels. 679; *Id.* 2 Gale, 127.

[5] Brickwood *v.* Anniss, 5 Taunton, 614.

[6] Johnson *v.* Boyer, 3 Watts (Pa.) 376.

the principal from imprisonment under a second execution.[1] If bail has been discharged by the giving of time, and afterwards agrees to continue liable without knowledge of the facts, such agreement does not bind him, and he is discharged.[2]

§ 426. **Discharge of bail by surrender of principal.**—As the undertaking of bail is that the principal shall appear at a certain time and place, the obligation is fulfilled if the principal does appear and comply with the terms of the undertaking. Bail in both civil and criminal cases may however be discharged by a surrender of the principal to the proper authorities before the day stipulated for the appearance of the principal. This surrender may be made by the principal himself,[3] by the bail,[4] or by an administrator of the bail,[5] and the bail will be thereby discharged, even though he is indemnified.[6] Where three persons became bail in a criminal case, and two of them surrendered the principal and were discharged, and the principal afterwards escaped, it was held the third person who had become liable as bail, was discharged by the surrender of the principal by the other two, and was not liable for anything happening afterwards.[7] Where a *ca. sa.* was returned by the sheriff *non est inventus* before the return day thereof, and the bail afterwards, and before the return day, offered to surrender the principal to the sheriff, it was held that this discharged the bail. The court said the bail had a right to a reasonable time to surrender the principal, and that time was the lifetime of the execution.[8] But bail in a criminal case are not discharged by a surrender of the principal to a deputy sheriff, because "the surrender of the principal in such a case must be to some officer who may commit the principal to jail or admit him to bail, but the deputy sheriff can do neither."[9] It has been held that the bail in a civil case cannot prove by parol that he surrendered his principal during the session of a previous term of the court, upon the ground that the proceedings of a court while in session can only be known by its record, and that an *exoneretur* should have been entered of

[1] Palethorpe *v.* Lesher, 2 Rawle (Pa.) 272.

[2] West *v.* Ashdown, 1 Bingham, 164.

[3] Dick *v.* Stoker, 1 Devereux Law (Nor. Car.) 91.

[4] Harp *v.* Osgood, 2 Hill (N.Y.) 216.

[5] Wheeler *v.* Wheeler, 7 Mass. 169.

[6] Brownelow *v.* Forbes, 2 Johns. 101; see, also, Mitchell *v.* Commonwealth, 12 Bush (Ky.) 247.

[7] State *v.* Doyal, 12 La. An. 653.

[8] Edwards *v.* Gunn, 3 Ct. 316.

[9] State *v.* LeCerf, 1 Bailey Law (So. Car.) 410 per Richardson, J.

record.[1] A party was arrested on a *ca. sa.*, and gave bail for his appearance at the next term of the inferior court, to be held on the second Monday of the next July, to take the benefit of an act concerning insolvent debtors. The next term of the court was held on the first Monday of July, and the bond was then declared forfeited. The principal appeared on the second Monday of July, according to the condition of the bond, and it was held the bail was thereby discharged.[2] A bail bond in a criminal case was forfeited because of the non-appearance of the accused, and a judgment was rendered against the bail. Subsequently the accused was arrested, tried and found guilty; but was granted a new trial, and released on new bail. A statute provided that forfeited bail might be relieved by the appearance, trial, conviction and punishment of the accused: Held, the original bail was not entitled to a discharge, because the accused had not been convicted and punished.[3]

§ 427. **Right of bail to arrest principal.**—The principal is presumed to be at all times in the custody of his bail, and the bail has at all times the right to arrest him and surrender him unto the custody of the law. Bail may arrest the principal without warrant, as the right to arrest does not depend upon a warrant, but results from the nature of the undertaking of bail, and he may, in such case at common law, command the assistance of the sheriff.[4] Bail may depute another to arrest and surrender the principal.[5] The deputy so appointed cannot appoint a deputy, but may employ assistants who must act in his presence.[6] As bail is supposed to be at all times and places with the principal, and the principal is at all times and places supposed to be in the custody of his bail, the bail in a civil case may, after demanding admission, break open the outer door of the dwelling house of the principal to take him.[7] So bail in a civil case may by himself or by his agent, arrest the principal in another state than that in which the bail bond is given. In holding this it has been said that: "By the common law, the bail has the custody of the principal and may take him at any time and in any place. * The

[1] Griffin v. Moore, 2 Kelly (Ga.) 331.

[2] Roberts v. Green, 31 Ga. 421.

[3] Johns v. Race, 18 La. An. 105.

[4] State v. Cunningham, 10 La. An. 393.

[5] Nicholls v. Ingersoll, 7 Johns, 146.

[6] State v. Mahon, 3 Harrington, (Del.) 568.

[7] Nicolls v. Ingersoll, 7 Johns, 146.

taking is not considered as the service of process, but as a continuation of the custody which had been, at the request of the principal, committed to the bail. The principal may, therefore, be taken on Sunday. The dwelling is no longer the castle of the principal, in which he may place himself to keep off the bail. If the door shall not be opened on demand at midnight, the bail may break it down, and take the principal from his bed, if that measure should be necessary to enable the bail to take the principal. * The obligation which the principal entered into, to the bail (viz. to be always at his command) was not discharged by stepping across the line of his state."[1] The same thing was held, where imprisonment for debt was abolished by the state in which the principal was arrested, after his arrest, and before his application for discharge.[2] But where the defendant gave bail in a civil suit and went to another state, and was there arrested, it was held that the bail could not take him from the custody of the sheriff in the latter state.[3] Bail in a civil suit has the right to arrest his principal and surrender him, even though no *ca. sa.* has been issued on the judgment recovered against the principal, and the creditor has died since the recovery of the judgment, and was dead when the bail arrested the principal.[4] After the forfeiture of a recognizance in a criminal case has been entered of record, it has been held, that the bail has no right to surrender the principal, and consequently has no right to arrest and detain him for that purpose.[5]

§ 428. **When sickness or death of principal excuses bail.**—As a general rule, bail, both in civil and criminal cases, will be discharged by the death of the principal at any time when his surrender would have discharged the bail. The death of the principal is the act of God, by which the bail should not be prejudiced.[6] Where the bail is fixed, so that the surrender of the principal would not avail him, he will not be discharged by the

[1] Commonwealth *v.* Brickett, 8 Pick. 138, per Putnam, J.; Nicolls *v.* Ingersoll, 7 Johns. 146.

[2] *Ex parte* Lafonta, 2 Robinson (La.) 495.

[3] Respublica *v.* Gaoler of Philadelphia, 2 Yeates (Pa.) 263.

[4] Parker *v.* Bidwell, 3 Ct. 84.

[5] Commonwealth *v.* Johnson, 3 Cush. 454.

[6] Wakefield *v.* McKinnell, 9 La. (Curry) 449; State *v.* Cone, 32 Ga. 663; Griffin *v.* Moore, 2 Kelly (Ga.) 331; Mather *v.* The People, 12 Ill. 9. To contrary effect, see Hamilton *v.* Dunklee, 1 New Hamp. 172.

death of the principal.[1] The principal in a prison-bounds bond, who by its terms was bound to file his schedule within forty days, was taken sick about ten days before the expiration of the forty days, and continued sick till after the expiration of that period, and then died without filing a schedule. The court said: "The general presumption of law should be that whilst there is life there is capacity to attend to the duties of legal obligation. The onus must always be on the defendant, to make such a showing as to exonerate him on account of illness. It must be an actual illness that suspends the capacity to perform legal duties, or it must be such as would obviously put one's life in jeopardy, by an attempt to perform a particular act." In such case the bail may be excused, on the ground that the act of God prevented performance, and if such was the case the bail was discharged.[2] It has been held to be a good defense to a suit against bail for the appearance of a fraudulent debtor, that the debtor had been stricken down by sickness at a distance from the place of hearing, so as to prevent his appearing at the time fixed, and that he appeared there as soon after his recovery as he was able to do so. The court said that where the contract is a voluntary one between parties, it is no excuse that an accident has prevented its fulfillment. But in the case of statutory bonds and obligations it is different, and in the latter case, when the act to be performed is of a purely personal character, which can only be done by the party himself, the act of God in producing sickness or insanity, as well as death, will excuse performance.[3]

§ 429. **Exoneration of bail by act for which he is bound being rendered unlawful.**—If the act for the performance of which bail becomes responsible is afterwards rendered illegal or impossible by the law making power, the bail will be thereby excused. Thus, if after bail in a civil case has signed, and before he is fixed, imprisonment for debt is abolished by the legislature, he will no longer be bound. When the imprisonment is no longer lawful, it would not be lawful for the bail to arrest his principal for the purpose of surrendering him.[4] Where a master

[1] Olcott *v.* Lilly, 4 Johns. 407; The State *v.* Scott, 20 Iowa, 63.

[2] Blackwell *v.* Wilson, 2 Richardson Law (So. Car.) 322, per Butler, J.

[3] Scully *v.* Kirkpatrick, 79 Pa. St. 324.

[4] Kelly *v.* Henderson, 1 Pa. St. 495; White *v.* Blake, 22 Wend. 612; Frey *v.* Hebenstreit, 1 Robinson (La.) 561; Brown *v.* Dillahunty, 4 Smedes & Mar. (Miss.) 713; Parker *v.* Sterling, 10 Ohio, 357.

became bail for the appearance of his slave to answer a criminal charge, and before the forfeiture of the bond slavery was abolished, it was held that the bail was thereby discharged. When the master became bound he had absolute control of the slave by virtue of his ownership. He was deprived of all control of the slave by the abolition of slavery, as the slave was not bound by the recognizance, being absolutely incapable of entering into a contract when a slave.[1] The defendant was arrested in Delaware for a debt contracted in Pennsylvania with a citizen of New Jersey, and gave special bail. After giving the bail he was finally discharged under the insolvent laws of Maryland, of which State he was a resident. A motion was made to exonerate the bail on account of this discharge. It was conceded that in the absence of comity the insolvent laws of a State could have no effect beyond its own borders, but it was contended that such comity existed between Delaware and Maryland. The Court discharged the bail without giving any reasons.[2]

§ 430. **How liability of bail affected by enlistment of principal in the army.**—If the principal, after bail becomes bound, voluntarily enlists in the army, and in consequence cannot be produced, this will not excuse the bail.[3] The defendant in a civil action gave bail, and afterwards enlisted in the service of the United States. An act of congress provided that during the term of service of such a person, he should be exempt from arrest for debt. Held, the bail was not excused. The court said: "To admit that a principal, by a voluntary assumption of a duty or office which may exempt him from arrest, may defeat this contract, or enable his surety to do it, without the consent of the party interested, would be to violate the common principles of justice, as well as the faith of engagements. The bail repose confidence in the debtor, the creditor does not." The cases where bail have been discharged by a change in the state of their principal, are all where the change has been involuntary.[4] If, however, the principal is drafted into the military service of the state, and

[1] Lewis v. The State, 41 Miss. 686; State v. Berry, 34 Ga. 546.

[2] Kennedy v. Adams, 5 Harrington (Del.) 160. On same subject, see Bailey v. Seals, 1 Harrington (Del.) 367; Beeson v. Beeson's Admr. 1 Harrington (Del.) 466.

[3] State v. Reaney, 13 Md. 230; State v. Scott, 20 Iowa, 63.

[4] Harrington v. Dennis, 13 Mass. 93; per Parker, C. J.

his surrender thereby becomes impossible, his bail will be excused.[1] It has also been held that bail was discharged where his principal was taken from his presumed custody by a United States Provost Marshal, and his surrender thereby rendered impossible. The court said: "The history of that period attests the omnipotence of a provost marshal in his district, and when the principal in a bail bond was arrested by the order of that officer, an effort on the part of his surety to take him into his custody would be not only unavailing, but might be perilous to himself."[2] Where a party was in jail for a criminal offense, and another voluntarily became his bail, and took him to another county for the purpose, as a matter of speculation, of putting him into the army as a substitute, and an officer of the United States took the principal from the bail, as a deserter, it was held that the bail was not thereby discharged.[3] A soldier in the service of the United States, who has committed a criminal offense, and been surrendered to the state authorities, and given bail for his appearance, and has then voluntarily returned to the army in another state, does not by such act release his bail.[4] Where the principal in a criminal case, after giving bail, enlisted in the army of the United States, and was out of the state, and on account of the rules of the army, could not be arrested and produced by the bail, and was also sick in another state, it was held that these facts were a sufficient ground for the continuance of a case against the bail for the non-production of the principal.[5]

§ 431. **How liability of bail affected by subsequent imprisonment of principal.**—With reference to the effect upon the liabitity of bail, which is produced by the subsequent imprisonment of the principal in the same or another state, upon the same or another charge, there is some conflict of authority. It has been held that bail in a civil suit is discharged, if the principal is afterwards convicted of a crime and imprisoned in the same state, as the bail is in such case prevented from performing his obligation by the act of the law.[6] It has also been held that bail in a prison-bounds bond is discharged if the principal is arrested

[1] Alford *v.* Irwin, 34 Ga. 25.

[2] Commonwealth *v.* Webster, 1 Bush (Ky.) 616, per Peters, C. J.

[3] Shook *v.* The People, 39 Ill. 443.

[4] Huggins *v.* The People, 39 Ill. 241.

[5] Gingrich *v.* The People, 34 Ill. 448.

[6] Canby *v.* Griffin, 3 Harrington (Del.) 333; Way *v.* Wright, 5 Met. (Mass.) 380; *contra*, where the imprisonment is only for a short time. Phœnix Fire Ins. Co. *v.* Mowatt, 6 Cow. 599.

on a charge of felony and committed to close confinement.[1] So the bail in a prison-bounds bond is discharged if the principal afterwards becomes insane, and is by the proper authorities committed to a lunatic asylum.[2] Where a party was arrested for crime, and gave bail in one state and was afterwards by the authorities of that state surrendered to the authorities of another state on a charge of murder, in which latter state he was imprisoned, when he should have been surrendered by his bail, it was held that the bail was discharged, because the state by its own act had rendered it impossible for the bail to surrender the principal.[3] A party gave bail in Connecticut to answer a criminal charge. He was afterwards arrested in New York on a requisition from the Governor of Maine, and was imprisoned in Maine when he should have appeared in Connecticut. It was contended that as the principal was surrendered by virtue of a clause in the constitution of the United States, providing for the extradition of fugitives, and as Connecticut was a party to the constitution and the obligee in the bond, the sureties were discharged by the act of the obligee, but it was held that the bail was liable. The court said that the several states as to such matters were as foreign to each other as independent states. The "act of the law" which will discharge bail must be the act of the law of the state in which the obligation is given. The principal might have gone to Maine on purpose to be arrested for some small offense if such a discharge should be allowed, and such collusion could never be proved. Imprisonment of the principal in a foreign state is no defense to his bail. "We should hesitate long before we should hold that the common law goes thus far to excuse bail, even if cases could be found where the doctrine contended for has been upheld. But we think the weight of decided cases is in accordance with the view we have taken of the phrase 'by the act of the law.'"[4] A principal having given bail that he would on a certain day appear to take the benefit of the insolvent laws, was before that day sent to the penitentiary in the same state for crime. Held, the bail was not discharged. The court said the bond was not in

[1] Bradford v. Consaulus, 3 Cowen, 128.

[2] Fuller v. Davis, 1 Gray, 612.

[3] State v. Allen, 2 Humph. (Tenn.) 258. Holding bail discharged if the principal is by proper authority confined elsewhere, see Belding v. State, 25 Ark. 315.

[4] Taintor v. Taylor, 36 Ct. 242, per Park, J.

the nature of a bail bond, but of a bond to secure the performance of a certain act. "The act of law, however, which excuses, is that which subsequently obliges the party to do or omit a certain thing, leaving him no option. It was not the law which compelled the commission of the offense in this instance; on the contrary, it forbade it."[1] Bail in a criminal case is generally discharged if the principal is again arrested on the same charge, during the time he is in custody; by virtue of the second arrest he is taken from the control of the bail.[2] So, bail in a civil case is discharged by a commitment of the principal on an alias *ca. sa.*, although a *scire facias* commenced after a return of *non est inventus* is pending at the time of such commitment.[3] The sureties in a *ne exeat regno* bond occupy the same position as bail at common law, and where the defendant in a writ of *ne exeat regno* has been proceeded against, and committed to jail for not complying with a final decree of the court in the same case, and afterwards escapes from custody, his sureties are discharged.[4]

§ 432. **When bail liable if accused appear and afterwards escape.**—Where the bail bond or recognizance in a criminal case provides that the accused shall appear and not depart without leave of the court, the bail is not usually discharged by the mere fact that the accused appears and is put upon trial, unless he is formally surrendered, as provided by law.[5] This was held in the case of such a bond where the accused appeared, was tried and found guilty, but did not appear to be sentenced.[6] Where a bond in a criminal case provided that the accused should appear and not depart without leave, and he did appear in the custody of the bail, and was delivered to the sheriff, and all spectators, including the bail, were, by the court, ordered to leave the court room, and did so, and the accused escaped, it was held the bail was not discharged. The accused was not surrendered in the

[1] Smith *v.* Barker, 6 Watts (Pa.) 508, per Rogers J. See, also, State *v.* Frith, 14 La. (Curry) 191; State *v.* Burnham, 44 Me. 278.

[2] Peacock *v.* The State, 44 Texas 11; Medlin *v.* Commonwealth, 11 Bush (Ky.) 605.

[3] Warren *v.* Gilmore, 11 Cush. 15. See, also, Bell *v.* Rawson, 30 Ga. 712; Milner *v.* Green, 2 Johns. Cas. 283.

[4] Johnson *v.* Clendenin, 5 Gill, & Johns. (Md.) 463. Holding, that if a debtor is arrested and discharged in one state he may be arrested for the same debt in another state, see Peck *v.* Hozier, 14 Johns. 346.

[5] Lee *v.* The State, 51 Miss. 665.

[6] Dennard *v.* The State, 2 Kelly (Ga.) 137; State *v.* Norment, 12 La. (Curry) 511.

manner provided by the statute, and the bail was bound by the terms of the bond that the accused should not depart without leave.[1] In another case, while the jury were out deliberating, the sheriff was informed that the accused was armed and intended to escape. He then asked the accused if he was armed, and being answered in the affirmative, requested him to surrender his arms, which being refused, the sheriff called for aid, and a struggle ensued, during which the accused escaped: Held, the bail was not discharged. Not having made a formal surrender of the accused as the statute provided, the bail was liable till the trial was over.[2] A party indicted for felony gave bail to appear at the next term of the court, "and not depart therefrom without leave." He appeared and was put upon his trial, and the court ordered him into the custody of the sheriff. Afterwards, while the jury were out, he escaped: Held, the bail was discharged, on the ground that the principal had been taken from his custody and placed in that of the law.[3] A party was arrested on a criminal charge before a justice, and gave a bail bond which provided that he should appear "and not depart thence without leave of court." He was afterwards indicted, and a bench warrant for his arrest was issued, upon which he was arrested and held in the custody of the sheriff till he was put upon trial, during the progress of which he escaped: Held, the bail was discharged. While the accused was in the lawful custody of the sheriff the bail could not control him.[4] A statute provided that "during the trial of an indictment for felony the defendant shall be kept in actual custody." A defendant, charged with felony, appeared and was put upon trial, and during the trial escaped. His bail bond provided that he should surrender himself into custody to answer the charge, and not depart without leave of court: Held, the bail was discharged. The defendant should have been taken into custody when the trial commenced, and the bail was not afterwards liable.[5]

§ 433. **How liability of bail affected by term of court not being held, change of venue, etc.—Bail in bastardy bond.**—A recognizance in a criminal case provided that the accused should ap-

[1] The State *v.* Tieman, 39 Iowa, 474.

[2] State *v.* Martel, 3 Robinson (La.) 22.

[3] Commonwealth *v.* Coleman, 2 Met. (Ky.) 382.

[4] Smith *v.* Kitchens, 51 Ga. 158. *Contra*, Commonwealth *v.* Branch, 1 Bush (Ky.) 59.

[5] Askins *v.* Commonwealth, 1 Duvall (Ky.) 275.

pear at the next term of the District court "and answer said charge, and abide the orders and judgment of said court, and not depart without leave of the same." The accused appeared at said term of court, and the venue was changed by order of the court to another county, and the accused did not appear in such other county. Held, the bail was liable for such non-appearance.[1] It has been held that a failure to hold the term of court at which the accused in a criminal case is required to appear, does not discharge his bail, who are obliged in such case to have him present when the court is held.[2] Bail for the appearance of a party at a particular term of court, will be liable though no proceedings were had against the principal at the term at which he was recognized to appear, where an order was made at that term continuing all cases not disposed of, and at the succeeding term the principal failed to answer.[3] A party arrested in a bastardy proceeding gave bond conditioned for his appearance to answer the charge "and perform the judgment of the court." He appeared, and judgment was rendered against him for $25 a year for seven years. Held, the bail could not discharge himself from liability for this judgment by surrendering the body of the principal.[4] Where a party charged with bastardy gave bond for his appearance "to answer the charge," and he appeared and pleaded not guilty, but was not surrendered to the court nor taken into custody, and pending the trial escaped, it was held the sureties were liable. "To answer the charge is not merely to plead to it; but it is to hold himself answerable to it until discharged by the court, or surrendered to its custody."[5] A recognizance in a bastardy case provided that the principal should appear at the next term of the court, and not depart without leave. The principal did appear, and the court continued the case till the next term, and suffered him to depart. Held, the bail was discharged, as the principal had appeared and departed by leave of the court.[6]

§ 434. **When bail bound though principal not liable to arrest —Duress of principal, etc.**—It has been held that bail in a criminal case is not liable where the charge stated in the bond is not

[1] The State v. Brown, 16 Iowa, 314.

[2] Commonwealth v. Branch, 1 Bush (Ky.) 59; The State v. Brown, 16 Iowa, 314.

[3] State v. Plazencia, 6 Robinson (La.) 417.

[4] Commonwealth v. Douglas, 11 Bush (Ky.) 607.

[5] Wintersoll v. Commonwealth, 1 Duvall (Ky.) 177, per Robertson, J.

[6] The People v. Greene, 5 Hill (N.Y.) 647.

such as will warrant any criminal prosecution.[1] Where a debtor was arrested in a civil suit, contrary to a positive provision of law, it was held that the bail given by him to procure his release was not bound, on the ground that the issuing of the writ was prohibited, and "a party never can obtain any legal benefit by a violation of law."[2] But it has also been held that it is no defense to bail, in a civil suit, that the principal was not liable to arrest when the bail bond was entered into. In holding this, it has been said that "The bail is estopped from denying that his principal was liable to arrest. It is conceded by entering into the recognizance * The privilege set up belongs to the principal alone; he may waive it if he chooses; and * we are bound here to assume he did so, otherwise he would have applied to the court or a judge at chambers for a discharge instead of putting in bail. The idea of duress is absurd, as special bail do not come into the cause till after the return of the writ, and abundant opportunity to apply for the discharge."[3] So it has been held that bail in a civil case cannot inquire into the sufficiency of the affidavit to hold to bail, nor question the legality of the order requiring bail.[4] It has been held that the bail in a criminal case, who are strangers to the accused, cannot set up duress of the principal as a defense, on the ground that, "although the principal may have been constrained to execute the recognizance by means of the duress, yet the sureties were under no such restraint."[5] Precisely the opposite doctrine has been held in the case of bail in a civil suit.[6] It has been held that a bail bond in a civil case, which contains a condition onerous to the surety, which is not warranted by law, or which omits a condition required by law, which is for the benefit of the surety, is absolutely void.[7] It has also been held that bail in a civil case is only bound to the extent required by law, no matter what may be the tenor of the bond, and that such bail

[1] State v. Jones, 3 La. An. 9.

[2] Stafford v. Low, 20 Ill. 152, per Walker, J.; Thornhill v. Christmas, 10 Robinson (La.) 543. Holding that the bail of a woman who was exempt from arrest in a civil case is not liable, see Thomas v. Stewart, 2 Pen. & Watts (Pa.) 475.

[3] Stever v. Sornberger, 24 Wend. 275, per Nelson, C. J.; Springfield Manf. Co. v. West, 1 Cush. 388.

[4] Lewis v. Brackenridge, 1 Blackf. (Ind). 112.

[5] Plummer v. The People, 16 Ill. 358, per Caton, J.; Huggins v. The People, 39 Ill. 241.

[6] Thompson v. Lockwood, 15 Johns. 256.

[7] Tucker v. Davis, 15 Ga. 573; Loyd v. McTeer, 33 Ga. 37; Alexander v. Bates, 33 Ga. 125.

may be relived by surrendering the principal, though the tenor of the bond is different.[1] It has been held that a voluntary bond entered into by principal, and bail before the sheriff requiring the principal to appear to answer a criminal charge, bound the bail, although the sheriff had no authority to take such a bond.[2] But where the sheriff of one county had the defendant in a civil suit in custody, on a *capias ad respondendum* in another county, and bail was accepted by the sheriff in the last-named county; it was held that the sheriff had no authority to do any act out of his own county, and that the bail was not liable.[3]

§ 435. **Liability of bail when principal indicted for another offense—Amendment of declaration—Change of form of action.**—It has been held that bail is liable for the appearance of the principal, if he is indicted for an offense of a higher grade, but which includes the offense described in the obligation.[4] When the accused was held to answer a charge of grand larceny, and appeared, but was indicted for burglary, it was held, in the absence of any showing that the indictment was based on the same transaction as the charge of grand larceny, that the bail was not liable for the further appearance of the accused to answer the indictment.[5] Bail in a criminal case was taken in pursuance of an order of court, the entry on the minutes requiring bail in $700, but the bail was given in $7,000, and the Judge at a subsequent term corrected and altered the minutes to $7,000. Held, the bail was not thereby discharged.[6] The principal in a civil suit gave bail in $1,000, conditioned that he would appear to answer an attachment. After the bail became liable, the plaintiff amended his declaration so as to claim $1,200, instead of $600, but no other change was made. The plaintiff recovered $1,200. Held, the bail was liable to the extent of his bond, on the ground that increasing the *ad damnum* was a statutory right which the plaintiff had, to which the bail must be presumed to have consented.[7] Where, after bail in a civil suit had become liable, the

[1] Slocomb *v.* Robert, 16 La. (Curry) 173.

[2] Park *v.* The State, 4 Ga. 329.

[3] Harris *v.* Simpson, 4 Littell (Ky.) 165.

[4] State *v.* Cunningham, 10 La. An. 393.

[5] The State *v.* Brown, 16 Iowa, 314. Holding that bail in a criminal case is not liable unless the accused is indicted for the offense charged, see People *v.* Sloper, 1 Cummins (Idaho) 183.

[6] State *v.* Frith, 14 La (Curry) 191.

[7] New Haven Bank *v.* Miles, 5 Ct. 587.

declaration was amended so as to embrace a new demand, but judgment was rendered on the original demand only, it was held that the bail was only liable to the extent of the original demand, was not injured by the amendment, and was therefore not discharged.[1] But where, after bail in a civil suit had been given, the *ad damnum* was increased on motion of the plaintiff and by leave of the court, it was held that the bail was discharged, on the ground that this was a material alteration of the contract of the bail.[2] In an old case, the principal in a civil suit was arrested in one county on an original writ laid in that county. Judgment was had against the principal in another county. Held, the bail was not liable.[3] An action of debt was commenced, and the defendant held to bail. The action was afterwards changed from debt to case, and it was held the bail was thereby discharged. The court said: "The bail can be made liable in no other manner than they have stipulated by their bond. In this case it is conditioned to be void, if the principal appears to answer to an action of debt, which the plaintiff hath instituted against him, but a different action from this is afterwards prosecuted, consequently the condition of the bond is not broken."[4]

§ 436. **Bail may defend suit against principal—Approval of bond need not be indorsed thereon—Pardon of principal—Other cases.**—Bail in a civil case will be permitted to defend the suit against his principal upon terms which are equitable.[5] Where a statute provides that a bail bond shall be accepted or approved by a certain person, such acceptance or approval is a mental operation, and need not be in writing, nor indorsed on the bond.[6] The pardon of the principal in a criminal case before conviction; is a discharge of his bail if such pardon is accepted by him, otherwise not.[7] Where, upon the return of *non est inventus*, on a *ca. sa.* against the principal, the bail gave a note for the amount of the judgment, which was afterwards reversed on a writ of error, it was held that as the bail was not fixed, and the judgment

[1] Seeley v. Brown, 14 Pick. 177. Holding that bail in a civil suit is not liable for costs of counts added to declaration, see Taylor v. Wilkinson, 1 Nevile & Perry, 629.

[2] Langley v. Adams, 40 Me. 125.

[3] Yates v. Plaxton, 3 Levinz, 235.

[4] Byan v. Bradley, Taylor, Law & Eq. (Nor. Car.) 77; Waples v. Derrickson, 1 Harrington (Del.) 134.

[5] Bonsal v. Harker, 2 Harrington (Del.) 327; Guthrie v. Morrison, 1 Harrington (Del.) 368.

[6] The State v. Wright, 37 Iowa, 522; People v. Penniman, 37 Cal. 271.

[7] Grubb v. Bullock, 44 Ga. 379.

was reversed, there was a failure of the consideration of the note, and the bail was not liable thereon.[1] A party convicted of crime gave bail for his appearance, in order to take his case to the supreme court, where the judgment was reversed, the case remanded, and a *nolle prosequi* entered therein. Held, the bail was not liable for the appearance of the principal to answer a subsequent indictment in the same matter.[2] Bail in a civil suit against two defendants, is not liable where a judgment is entered by agreement, against only one of the defendants.[3] A recognizance providing for the appearance of the accused before the "circuit court," when there is no circuit court, but a "district court," has been held not to create any liability against the bail, and cannot be enforced.[4]

§ 437. **Bail in civil case not discharged by issuing of fi. fa. first against principal—Other cases concerning ca. sa.**—Bail in a civil suit is not discharged by the plaintiff taking out a *fi. fa.* previous to issuing a *ca. sa.* With reference to this it has been said: "What objection can there be to the plaintiff's proceeding in the first instance against the property of the defendant? If the bail are made to pay the debt of the principal they may resort to the property of their principal, and is it not to their advantage that this should be done in the first instance? * The contract is not altered but is in fact pursued, for the bail are to pay on the failure of the principal to do so. This certainly implies that the plaintiff may endeavor to make him do so before he applies to the securities, and, as to time, there cannot be, and therefore there is not, any day fixed when the bail are to be called on."[5] If the amount indorsed on a *capias ad respondendum* does not conform to the amount sworn to be due, the bail will be discharged on motion.[6] But where the items indorsed on such a writ were, after the bail became liable, changed by order of the court, but the aggregate remained the same, it was held the bail

[1] Tappen v. Van Wagenen, 3 Johns. 465.

[2] Lamp v. Smith, 56 Ga. 589. Holding that bail in a civil suit is discharged if judgment in the court below is rendered in favor of the principal, even though it is reversed in the Supreme Court, see Butler v. Bissel, 1 Root (Ct.) 102.

[3] Commonwealth v. Clay, 9 Phila. (Pa.) 121.

[4] Sherman v. The State, 4 Kansas, 570.

[5] Ogier v. Higgins, 2 McCord Law (So. Car.) 8 per Colcock, J.; Aycock v. Leitner, 29 Ga. 197.

[6] Jennings v. Sledge, 3 Kelly, (Ga.) 128.

was not discharged.[1] A statute provided that bail in a civil case should not be liable until a *ca. sa.* had been issued on final judgment against the principal, and returned not found. Held, the sheriff could not, by a return of the execution *non est inventus* before the return day, charge the bail before that period. The execution, in order to charge the bail, must remain in the sheriff's hands till the return day.[2] A statute provided that bail in a civil case should surrender his principal within ten days after judgment. A judgment was recovered but no execution was taken out, nor was the principal surrendered within ten days. Afterwards execution was taken out, and within ten days from that time the principal offered to surrender himself. Held, this was a sufficient compliance with the statute to discharge the bail.[3]

§ 438. **Miscellaneous cases holding bail discharged.**—Where a joint judgment was recovered against three persons, and a *ca. sa.* was issued against all, but by direction of the creditor was not executed as to two of the defendants, and was returned *non est inventus* as to the third, it was held that the bail of the latter was not liable. The creditor must honestly try to collect the money from all the principals before coming on the bail of one.[4] It has been held that before bail in a criminal case can be made liable, the record must show that the principal was called and did not appear.[5] A party indicted for crime gave bail in the sum of $50, which was less than the amount required by the court. Afterwards the sheriff, without the knowledge of the bail, changed the penalty of the obligation to $100. Upon being informed of this alteration, the bail assented thereto, but there was no new delivery of the obligation. Held, the bail was discharged. When the obligation was altered it became absolutely void, and a parol assent to the change without a new delivery, did not revivify it.[6]

[1] Enos *v.* Aylesworth, 8 Ohio St. 322.

[2] Litchten *v.* Mott, 10 Ga. 138. Holding that a *ca. sa.* must issue against the principal before bail in a civil case can be sued, see Holland *v.* Bouldin, 4 T. B. Mon. (Ky.) 147.

[3] Allen *v.* Breslauer, 8 Cal. 552.

[4] Trice *v.* Tunentine, 5 Iredell Law (Nor. Car.) 236.

[5] Park *v.* The State, 4 Ga. 329.

[6] Sans *v.* The People, 3 Gilman (Ill.) 327. Holding that an affidavit to hold to bail in a civil case must be positive as to the amount due, see Penrice *v.* Crothwaite, 11 Martin (La.) O. S. 537. Where the creditor connives at the escape of the debtor from prison, he cannot recover against the surety in the prison-bounds bond, Conant *v.* Patterson, 7 Vt. 163. Holding that if the plaintiff's attorney agrees to discharge bail in a civil suit, the bail will be discharged, see Hughes *v.* Hollingsworth, 1 Murphy (Nor. Car.) 146. As to lia-

§ 439. **When failure to indict principal does not discharge bail—Justification of bail—Other cases holding bail liable.**— Bail for the appearance of the principal at the next term of court to answer an indictment, should one be found, cannot be heard to say that their principal did not appear, because no indictment was found against him. Nor can the bail in such a case be heard on any question touching the indictment, unless they produce the principal.[1] It has been held that the sureties in a sheriff's recognizance, cannot show that they did not acknowledge it, for that would be to contradict a solemn record.[2] It has been held no defense to bail in a criminal case, that the principal by reason of mob violence existing in the county before and at the time he should have appeared, and the fear of losing his life by violence, had fled, and could not safely have remained in the county.[3] A bail bond which gives the name of the offense for which the principal is held, sufficiently complies with the statutory provision of "briefly stating the nature of the offense." The statutory form need not be literally followed.[4] If bail in a civil suit enter into a recognizance, he is liable, although he is excepted to and does not justify.[5] To a suit upon a recognizance for the appearance of a party charged with crime, the bail cannot set up as a defense the fact that the several amounts for which they justified, do not equal double the sum at which the bail was fixed by order of the court. The justification is no part of their contract.[6] The sheriff having a prisoner in charge, and having authority by law to take bail, did so, and discharged the prisoner. The accused appeared the next day, and the sheriff told the bail that he would get others to sign the bail bond. This he failed to do. Held, the

bility of surety on prison-bounds bond when prison limits have been enlarged, see Guion *v.* Ford, 12 Robinson (La.) 123. Holding that the surety in a prison-bounds bond cannot surrender his principal to close confinement, see *Ex parte* Badgley, 7 Cowen, 472. Holding that measure of damages for not surrendering principal in a civil suit is the full amount of the debt, even though the principal was insolvent, see Hall *v.* White, 27 Ct. 488. Holding that a party who signs a bail bond, in the body of which his name is not mentioned, is not liable, see Adams *v.* Hodgepeth, 5 Jones Law (Nor. Car. 327.

[1] State *v.* Cocke, 37 Texas 155; Fleece *v.* The State, 25 Ind. 384; State *v.* Rhodius, 37 Texas, 165.

[2] McMicken *v.* Commonwealth, 58 Pa. St. 213.

[3] Sugarman *v.* The State, 28 Ark. 142.

[4] State *v.* Birchim, 9 Nevada. 95.

[5] Bramwell *v.* Farmer, 1 Taunton, 427.

[6] People *v.* Shirley, 18 Cal. 121. To similar effect, see People *v.* Carpenter, 7 Cal. 402.

bail was not discharged. The authority of the sheriff ceased when he took the bail bond.[1]

§ 440. **Miscellaneous cases holding bail liable.**—Two defendants having been arrested in a civil suit, gave bail for their appearance. Subsequently judgment was recovered against both defendants, and a *ca. sa.* was issued, upon which one of them was arrested and the other not. Held, the arrest of the one did not satisfy the judgment against the other nor discharge the bail.[2] A statute required, that in criminal recognizances there should be two sureties. A single surety signed such a recognizance, and it was held that he was bound. The law was not intended for the benefit of sureties, but of the state, and while the state might require two sureties, it could waive its rights in that regard.[3] A was arrested in a suit against himself and B as copartners, and gave bail to appear and answer and abide the judgment in the case. Held, the liability of the bail was not affected by a discontinuance of the original action as to B. The court said there was nothing in the bond which limited the liability to a joint judgment. The discontinuance was authorized by law. No claim of the bail to contribution or subrogation was affected, and he was in no manner injured.[4]

§ 441. **Bail entitled to indemnity.**—The legal obligations of bail in a criminal case are, in effect, the same as bail in a civil

[1] McClure *v.* Smith, 56 Ga. 439.

[2] Crouse *v.* Paddock, 8 Hun (N. Y.) 630.

[3] State *v.* Benton, 48 New Hamp. 551.

[4] Sanderson *v.* Stevens, 116 Mass. 133. Holding that changing the name of the obligee in a bail bond does not discharge the bail under certain special circumstances, see Hale *v.* Russ, 1 Greenl. (Me.) 334. Holding that one cognizor cannot object that another is not liable, nor that the suit against him has not been disposed of, see Mussulman *v.* The People, 15 Ill. 51. Holding that the surety in a poor debtor's bond is not excused because the principal has been discharged as a bankrupt, see Goodwin *v.* Stark, 15 New Hamp. 218. The obligation by a third person given to bail to secure the appearance of the principal is valid; Harp *v.* Osgood, 2 Hill (N. Y.) 216. Holding that where a statute provides the manner in which bail may be discharged, all the provisions of the statute must be complied with, see Cleveland *v.* Skinner, 56 Ill. 500. Holding that an officer who has taken insufficient bail may be at once sued therefor without any previous proceeding against the bail, see Rayner *v.* Bell, 15 Mass. 377. Where, during the pendency of a civil action, the creditor released the bail therein from "all actions, duties and demands," it was held that this did not discharge the bail if judgment was subsequently recovered in the suit against the principal; Hoe's Case 5, Coke, 70 *b*.

action, and bail in a criminal case may recover indemnity from his principal the same as bail or a surety in a civil action. And in a suit against the principal by the bail for indemnity, it is no defense for the principal that the bail did not appeal to the action on the recognizance, and take advantage of a technical objection. It was the duty of the principal to defend the action.[1] If a party accused of crime, in order to induce another to become his bail, gives such other a mortgage for his indemnity, the mortgage will be valid for that purpose. In such a case it was contended that it was contrary to public policy to "allow a party to substitute a property security to enable him to escape an offense." The court said: "We are not prepared to sustain this doctrine. That a principal should, in case of default, not indemnify his bail against the effects of his forfeiture or failure to attend and answer for the crime, has never been doubted by anybody, and no authority is offered to support the position."[2] It has been held that the person who agrees to indemnify bail against loss, by reason of his becoming such, must be notified that the bail has been damnified, before he can sue on his agreement.[3]

[1] Reynolds v. Harral, 2 Strobhart Law (So. Car.) 87.

[2] Simpson v. Roberts, 35 Ga. 180 per Lumpkin, J.

[3] Reynolds v. Magness, 2 Iredell Law (Nor. Car.) 26.

CHAPTER XXI.

OF SURETIES ON OFFICIAL BONDS.

§ 442. **Liability of surety on official bond required by statute when statute not strictly complied with.**—The liability of sureties on official bonds is a subject of great and growing importance. The general principles elsewhere discussed in this work are of course applicable to such sureties, as well as to all other sureties. In this chapter, such cases as do not appropriately come under other subdivisions of this work, and as concern sureties on official bonds will be noticed. In a majority of instances official bonds are given in pursuance of some statutory requirement. An official bond which is in substance and legal effect the same as the form prescribed by statute, but is not in the same words, is a statutory bond.[1] But in order that a bond required by statute may be valid and bind the sureties, it must be under seal, for otherwise it is not a bond.[2] Where a statute provides that a bond with two sureties shall be given by an officer, such provision is merely directory, and a bond signed by one surety only will bind such surety.[3] A defect in the approval of an official bond cannot be set up by the sureties therein as a defense. The object of requiring the approval is to insure greater security to the public, and the sureties cannot object that their bond was accepted without proper examination into its sufficiency by the officers of the law.[4] The failure of the justices of the orphan's court to attest a sheriff's bond, as required by law, is no objection to its validity. The attestation was not required for the benefit of the sheriff or his sureties, and formed no part of the inducement for them to enter into the contract.[5]

§ 443. **Liability of surety when official bond contains provisions in excess of statutory requirements.**—Where a statute provides that an official bond shall be given in a certain penalty, and contain certain conditions, if the principal and surety voluntarily enter into a bond in a greater penalty, or which contains more onerous conditions, the bond will be binding, at least to the extent of the statutory requirements. In such case, the conditions in excess of the statutory requirements may be rejected as surplusage, and the bond sustained as to the others. But if a bond in

[1] McCracken v. Todd, 1 Kansas, 148.

[2] State v. Thompson, 49 Mo. 188.

[3] Sharp v. United States, 4 Watts, (Pa.) 21; The Justices v. Ennis, 5 Ga. 569; Mears v. Commonwealth, 8 Watts (Pa.) 223.

[4] People v. Edwards, 9 Cal. 286; McCracken v. Todd, 1 Kansas, 148; State v. Hampton, 14 La. An. 736.

[5] Young v. The State, 7 Gill & Johns. (Md.) 253.

excess of the statutory requirement is extorted from the principal as a condition precedent to his entering upon the duties of his office, such bond is not binding.[1] If the penalty of an official bond is less than provided by statute in such case, it is not for that reason invalid.[2] Where a state treasurer voluntarily gave an official bond in the sum of $102,500 where the law only required one in the sum of $100,000, it was held the bond was valid and the sureties liable, although the court said it would have been otherwise if the authorities had demanded a bond greater in amount than that required by law. The court said: "The fixing of the amount in which the bond shall be given is very clearly for the protection of the treasurer—to guard him against the requirement of excessive security—but there is nothing in the statute in anywise prohibiting him from giving, or the examiners from accepting, a greater, should the treasurer voluntarily choose to offer it. * If the fixing of the penalty of the bond be for the benefit of the treasurer, he can waive it, and did so in this case, by voluntarily offering one in a penalty exceeding that required."[3]

§ 444. **Surety on voluntary bond of officer liable.**—If a person occupying official position voluntary gives a bond providing against loss by reason of his acts as to matters concerning which there is no statutory provision, such bond, although not a statutory bond, is, if it is founded on a sufficient consideration, and is not prohibited by statute, nor contrary to public policy, valid and binding on the principal and his surety as a voluntary common law obligation.[4] If a guardian, without being required so to do by order of court, voluntarily gives a bond which

[1] United States *v.* Mynderse, 11 Blatchford, 1; Bomar *v.* Wilson, 1 Bailey Law (So. Car.) 461; Treasurers *v.* Bates, 2 Bailey Law (So. Car.) 362; Armstrong *v.* United States, Peters' Cir. Ct. R. 46; M'Caraher *v.* Commonwealth, 5 Watts & Serg. (Pa.) 21; Welsh *v.* Barrow, 9 Robinson (La.) 535; Johnston *v.* Gwathney, 2 Bibb (Ky.) 186; Boswell *v.* Lainhart, 2 La. (Miller) 397. See, also, State *v.* Findley, 10 Ohio, 51.

[2] Grimes *v.* Butler, 1 Bibb (Ky.) 192.

[3] State *v.* Rhoades, 6 Nevada, 352, per Lewis, C. J. Holding that an injunction bond which contains a provision not required by statute, but which the Chancellor has the right to require, is valid, see Jameson *v.* Kelly, 1 Bibb (Ky.) 479.

[4] United States *v.* Mason, 2 Bond, 183; Farmers & Mechanics Bank *v.* Polk, 1 Delaware Ch. R. 167; Bank of the Northern Liberties *v.* Cresson, 12 Serg. & Rawle (Pa.) 306. See, also, Slawson *v.* Ker, 29 La. An. 295; *contra*, State *v.* Bartlett, 30 Miss. 624.

might have been exacted of him by order of court, such bond is good as a voluntary obligation.[1] Where the bond of a sheriff is filed too late to be good as a statutory bond, it is good at common law against him and his sureties.[2] A statute provided that a sheriff should give a bond in such sum, not less than $2,000, nor more than $50,000, as should be prescribed by the probate court, and that the bond should be approved by said court. Without any order of the court, and without any approval by it, a sheriff and his sureties signed an official bond in the penalty of $10,000, and deposited it for record. Held, the bond was valid and the sureties liable thereon.[3] The bond of a deputy sheriff is not avoided by the fact that the county court did not enter of record that he was a man of honesty, probity, and good demeanor (which entry was required by law to be made in such cases), and that he did not take the several oaths required by law to be taken by a deputy sheriff. To hold the bond void in such a case would be to allow the deputy to take advantage of his own wrong.[4] Where there is no statute requiring a sheriff's bond to be acknowledged in open court, it is binding on those who execute it, although not so acknowledged. It is the execution of the bond and not its acknowledgment which gives it validity.[5]

§ 445. **Sureties of an officer de facto liable for his acts.**—It is no defense to the sureties of an officer *de facto* that he is not also an officer *de jure*. Thus, where certain sureties signed the bond of one who acted as justice of the peace, and as such, collected money, it was held that they were liable for his acts, even though he may not have been legally elected, nor commissioned, nor sworn as justice, and his bond may not have been approved by the proper authorities. The court said: "By signing his bond they (the sureties) acknowledged his right to the office, and to discharge its duties, and as such, recommended him to the public. They, at least, shall not be heard to say that, although they signed his bond, and thereby induced others to put money in his hands, relying on their bond for its safety, still he was not elected, was not commissioned, was not sworn; that he was not, in fact, a justice."[6] A person ineligible to the office of sheriff

[1] Potter v. The State, 23 Ind. 550.
[2] Crawford v. Howard, 9 Ga. 314.
[3] McCracken v. Todd, 1 Kansas, 148.
[4] Cecil v. Early, 10 Gratt. (Va.) 198.
[5] Supervisors of Washington Co. v. Dunn, 27 Gratt. (Va.) 608.
[6] Green v. Wardell, 17 Ill. 278, per Caton, J. To the same effect, where

was elected, took the oath of office, gave bond with sureties, and collected taxes which he failed to pay over: Held, his sureties were liable for the money thus collected.[1] It is no defense to the sureties of a town collector that the taxes collected by him were not legally assessed, or that the collector was not legally entitled to the office.[2] The sureties of a trustee cannot set up as a defense that the trustee was irregularly appointed by the court upon a petition, instead of upon a bill, etc.[3] A state treasurer was re-elected, and accepted a new commission, and took a new oath, and continued to discharge the duties of the office, but failed to file a new bond within the time prescribed by law, which failure by law worked a forfeiture of the office: Held, this was not a holding over of the old term; but the treasurer was an officer *de facto*—holding as of a new term; and that sureties on a new bond, afterwards filed by the treasurer, which recited his election as treasurer, were estopped to deny that he was holding as of the new term *de jure*. The court said it would have been otherwise if he had been a mere usurper, and not an officer *de facto*.[4] An official bond given by an agent of fortifications, whose appointment is irregular, but whose office is established by law, though void as a statutory obligation, is valid as a contract to perform the duties appertaining to the office of agent of fortifications, and is binding on the sureties therein.[5] Where failure or neglect of a master in chancery elect to tender his bond for approval, deposit it with the treasurer, sue out his commission, and take and subscribe certain oaths, is cause for forfeiture of the office; the sureties of the master who is guilty of such failure or neglect, but who nevertheless exercises the duties of the office under his election, are liable for his acts and defaults.[6] Where sureties have signed a bond which recites the official character of the principal, who actually exercises the duties

the appointment of a guardian who acted as such, was void, see Corbitt v. Carroll, 50 Ala. 315. See, also, Ford v. Clough, 8 Greenl. (Me.) 334.

[1] Jones v. Scanland, 6 Humph. (Tenn.) 195. To similar effect, with reference to sureties of a district attorney, see State v. Wells, 8 Nevada, 105.

[2] Mayor and Selectmen of Homer v. Merritt, 27 La. An. 568.

[3] People v. Norton, 9 New York, 176.

[4] State v. Rhoades, 6 Nevada, 352.

[5] United States v. Maurice, 2 Brock. 96.

[6] State v. Toomer, 7 Richardson Law (So. Car.) 216. Holding that the surety of the collector of an estate may show as a defense that the court which appointed the collector had no jurisdiction to make the appointment, see Boyd v. Swing, 38 Miss. 182.

of the office, they are estopped by such recitals to deny the official character of the principal. Having given color to the principal's claim upon the office, and held him out to the world as the proper incumbent of the position, it would be manifestly unjust to permit them to deny these facts after others have acted upon them.[1] The fact that an officer who actually exercises the duties of an office, does not take the oath of office, is no defense to the sureties on his official bond. Usually the omission or neglect to take such oath is a breach of duty on the part of the officer, for which the sureties are liable, the same as for any other breach of duty on his part.[2]

§ 446. **Liability of surety of treasurer where money deposited with him was illegally obtained.**—The board of supervisors of a county, without any authority of law, and without there being any legal prohibition, appointed a treasurer, and authorized him to borrow $6,500. He borrowed that sum and then gave a bond with surety for his good behavior in the office. Afterwards, without any color of authority, he borrowed a much greater sum, and became a defaulter for the whole. The supervisors paid all the money so borrowed by their treasurer and sued the surety on the bond. Held, the surety was liable for $6,500, and no more. The bond was valid, as it was not prohibited by law. The treasurer was simply the agent of the supervisors, and they had a right to take a bond for his good behavior. He was their authorized agent to borrow $6,500 only, and the sureties only became answerable that so much of this sum as he might succeed in obtaining should be faithfully expended or accounted for by him.[3] The sureties of a county treasurer are liable for money received by him from the county commissioners, even though the commissioners may have exceeded their legal powers in borrowing the money. "No matter whether they have, or have not, legal authority to borrow money by issuing scrip or any other form of

[1] Kelly *v.* The State, 25 Ohio St. 567; Burnett *v.* Henderson, 21 Texas, 588; Inhabitants of Wendell *v.* Fleming, 8 Gray, 613.

[2] Lyndon *v.* Miller, 36 Vt. 329. Municipality of Whitby *v.* Flint, 9 Up. Can. C. P. R. 449; Laurenson *v.* The State, 7 Harr. & Johns. (Md.) 339; State *v.* Bates, 36 Vt. 387; Corporation of Whitby *v.* Harrison, 18 Up. Can. Q. B. R. 606; County Com. of Ramsey Co. *v.* Brisbin, 17 Minn. 451; State *v.* Findley, 10 Ohio, 51.

[3] Supervisors of Rensellaer *v.* Bates, 17 New York, 242; see, also, on this subject, Commonwealth *v.* Jackson's Exr. 1 Leigh (Va.) 485.

security, if they do it and bring the money into the county treasury, the treasurer is bound to keep it and disburse it according to law, and if he fails in that duty his sureties are liable on the official bond."[1] Where county commissioners, in violation of law, have issued scrip which the county treasurer has received, deposited and paid out as money, the sureties of the treasurer are liable for his default with reference to such scrip, the same as if it had been money. The treasurer treated it as money, and having done so, he is estopped to deny that it was money, and his sureties are in no better position.[2]

§ 447. **Liability of surety of tax collector, etc.**—The sureties on a bond given by a sheriff for the collection of taxes, cannot, when sued for taxes collected and not paid over by the sheriff, contest the legality of the ordinances making the assessment. By receiving the tax roll and executing the bond, the sheriff and his sureties recognized the legality of the ordinances, and it is too late to contest their validity, as to money collected, after acting under them and collecting taxes.[3] Defects in a warrant or tax list may be a good reason for not executing the warrant, but a collector having collected money without objection by the taxpayers, is liable to account therefor, and his sureties cannot, by reason of such defects, excuse themselves from paying the money collected by the principal in the bond, wherein they have bound themselves that he "shall well and faithfully perform all the duties of his office."[4] But where the bond of a collector of taxes provided that he should "well and truly collect all such rates as should be committed to him, for which he should have a sufficient warrant under the hands of the assessor according to law," it was held that money received by the collector under a tax list not signed by the assessor, was not legally collected, was not within the condition of the bond, and the sureties on the bond were not liable therefor.[5] A surety of a tax collector of city taxes cannot protect

[1] Boehmer *v.* County of Schuylkill, 46 Pa. St. 452.

[2] Wylie *v.* Gallagher, 46 Pa. St. 205. As to liability of a surety when money is received by the principal without authority, see Franklin *v.* Hammond, 45 Pa. St. 507.

[3] McGuire *v.* Bry, 3 Robinson (La.) 196. To similar effect, see Miller *v.* Moore, 3 Humph. (Tenn.) 189; Mississippi County *v.* Jackson, 51 Mo. 23. But see, to a contrary effect, Quynn *v.* The State, 1 Harr. & Johns. (Md.) 36; Ellicott *v.* The Levy Court, 1 Harr. & Johns. (Md.) 359.

[4] Inhabitants of Orono *v.* Wedgewood, 44 Me. 49.

[5] Foxcroft *v.* Nevens, 4 Greenl. (Me.) 72.

himself against liability for taxes received by the collector and not paid over, by showing that a portion of the taxes stated in the tax warrant, and paid over to the collector, had been levied on certain persons and property not subject to taxation. Having received the money, it was the duty of the collector to turn it over, and it did not lie in his mouth, nor in that of his surety, to say it had been illegally levied.[1] The sureties of a tax collector are liable for money collected by him, even though he is informally notified to make the collection.[2] If a tax collector actually collects taxes, it is no defense to his sureties with reference to the money so received, that the tax roll was not delivered to him till after the expiration of the time limited by law for that purpose.[3] But it has been held a sufficient defense to the sureties on a tax collector's bond, that no tax roll was delivered to him.[4] The sureties on the official bond of a state treasurer are responsible for all money or other things received by him into the treasury by virtue of his office, and not properly accounted for, though such money or other things have not been audited by the auditor, and the auditor has given no warrant or certificate authorizing the treasurer to receive the same. The reception of the property by the treasurer is that which makes the sureties liable. The audit is one method of showing that the treasurer has received the property, and is a matter provided for the safety of the state.[5]

§ 448. **Surety of sheriff liable for money collected by him, even though judgment and execution irregular.**—In an action on a sheriff's bond for money collected by the sheriff on an execution in favor of the plaintiff, neither the sheriff nor his sureties can plead that there was no judgment on which the execution issued. "The sheriff recognized the legality and authority of the execution by acting upon it; and after having collected the money, it is not for him to say that the writ was illegal or unauthorized by the judgment."[6] So, when a constable has collected money on execution, it is no defense for either him or his sureties that the judgment and execution were irregular by rea-

[1] Moore *v.* Allegheny City, 18 Pa. St. 55.

[2] State *v.* Odom, 1 Spears Law (So. Car.) 245.

[3] Todd *v.* Perry, 20 Up. Can. Q. B. R. 649.

[4] Municipality of Whitby *v.* Flint, 9 Up. Can. C. P. R. 449.

[5] Wilson *v.* Burfoot, 2 Gratt. (Va.) 134.

[6] State *v.* Hicks, 2 Blackf. (Ind.) 336, per Scott, J.

son of being in favor of the plaintiffs by their firm name.[1] A sheriff seized certain property, for which a forthcoming bond with surety was given. The execution on which the sheriff seized the property was not under the seal of the court from which it issued. Held, the execution had no validity as against the principal, and the surety was not bound.[2]

§ 449. **When surety not liable for default of principal occurring before execution of surety's obligation.**—As a general rule, the bond of a public officer has no retroactive effect, and does not cover past delinquencies unless it in terms says that it is to have such effect.[3] Rector was commissioned surveyor of public lands June 13th, 1823, and his official bond was dated August 17th, 1823. Between March 3d and June 4th, in the same year, there had been paid to Rector from the treasury a large sum, which was thus paid to him before the date of his commission and bond. Held, that for any sum paid Rector before the execution of the bond, there was but one ground on which the sureties could be held liable, and that was that Rector still held the money when the bond was executed. If he still held it he was the bailee of the United States. If not, he had become a debtor or defaulter to the government, and his offense was already complete. If it was intended to cover past delinquencies, the bond should have said so. If it did not say so, it covered no delinquencies occurring prior to its execution.[4] A county court had power as often as it deemed proper to rule the sheriff to give additional sureties. Held, that persons who in September, 1865, voluntarily signed their names to the sheriff's old bond, which had been executed in the preceding February, became liable to the same extent as if they had signed their names to such bond when it was first executed in February, and that it was an official bond as to such sureties.[5] A being surety of a county treasurer, the treasurer gave a bond with new sureties, and the bond on which A was liable was destroyed, all parties then supposing the treasurer was not a defaulter. Afterwards it was discovered that the treasurer was a defaulter before the destruction

[1] Nutzenholster v. The State, 37 Ind. 457.

[2] King v. Baker, 7 La. An. 570.

[3] Myers v. United States, 1 McLean, 493; United States v. Spencer, 2 McLean, 405.

[4] Farrar v. United States, 5 Peters, 373. To similar effect, see United States v. Boyd, 15 Peters, 187.

[5] Commonwealth v. Adams, 3 Bush. (Ky.) 41. Holding the surety of an executor liable for money received by

of the bond on which A was liable. Held, A was liable in equity for such default.[1]

§ 450. **When an official bond takes effect.**—With reference to the time when an official bond takes effect, the following cases are instructive: The bond of a deputy postmaster, takes effect and speaks from the time that it reaches the postmaster general and is accepted by him, and not from the day of its date, nor from the time it is deposited in the post office to be sent forward. The acceptance of the bond is a condition precedent to the postmaster taking office, and the bond cannot relate back to any earlier date than the time of its acceptance.[2] An act of congress required the bond given by a collector of customs, to be approved by the comptroller of the treasury. Such a bond was dated June 2d; the collector died July 24th, and a written approval of the bond was entered thereon by the comptroller, July 31st. The giving of a bond was not a condition precedent to the taking of office by the collector, as he might act for three months without giving bond. The sureties in the bond contended that they were not bound, because the bond had not been delivered till after the principal was dead. Held, the bond must take effect from the time the principal and sureties first parted with it and sent it on for approval, and not from the date of its approval. The approval need not have been in writing, and the statute requiring approval was merely directory. "A bond may not be a complete contract until it has been accepted by the obligee, but if it be delivered to him to be accepted, if he choose to do so, that is not a conditional delivery, which will postpone the obligor's undertaking to the time of its acceptance, but an admission that the bond is then binding upon him, and will be so from that time, if it shall be accepted. When accepted, it is not only binding from that time forward, but it becomes so upon both, from the time of delivery."[3] The surety of a collector of tolls is liable for money collected by him for the state on the day of the date of the bond, even if the collector had been previously acting in the same capacity under another bond.[4]

the executor before the execution of the bond, see Choate v. Arrington, 116 Mass. 552.

[1] County of Fontenac v. Breden, 17 Grant's Ch. R. 645.

[2] United States v. LeBaron, 19 Howard (U. S.) 73.

[3] Broome v. United States, 15 Howasd (U. S.) 143, per Wayne, J.

[4] Miller v. Commonwealth, 8 Pa. St. 444.

§ 451. **Surety of officer not liable for money received by principal out of the line of his duties.**—The sureties on an official bond are, as a general rule, only liable for such sums of money as their principal may lawfully receive by virtue of his office. Thus, the sureties on the bond of a town supervisor, containing the condition that he will "account for all moneys belonging to the town, coming into his hands as such supervisor," are only liable for money which their principal is authorized and bound by law to receive in his official capacity as disbursing agent of the town, and not for that of which he becomes the voluntary custodian, or which is ordered by the board of supervisors, without authority of law to be paid to him. "The condition of the bond must be construed, and the liability of the sureties limited in reference to the statutes making the supervisor a custodian of public moneys. These statutes make a part of the contract of the surety. * Liabilities of sureties are *strictissimi juris*, and cannot be extended by construction or enlarged by the acts of others."[1] Where a fund, being in the hands of an ordinary under a mistaken notion as to his right to receive and hold it officially (which in fact he had no right to do), was paid over to his successor, who threatened suit unless such payment was made, it was held that the surety of the successor was not liable for such money.[2] The bond of an overseer of the poor provided that he should account for all such sums of money as should "come into his hands by virtue of his office of overseer." Held, his sureties were not liable for money which he borrowed without authority, and applied to parochial purposes, but for which he failed to account.[3] The sureties on a bond for the conduct of an agent in paying invalid pensions, are not answerable for his defaults with reference to the payment of navy and privateer pensions, although he is also agent for the payment of the latter pensions.[4] The sureties of a register of the land office are not liable for money received by him from a party who enters lands. The money should have been paid to the state treasurer, and it was no part of the duty of the register to receive it.[5]

[1] People v. Pennock, 60 New York, 421, per Allen, J.

[2] State v. White, 10 Richardson Law (So. Car.) 442.

[3] Leigh v. Taylor, 7 Barn. & Cress. 491.

[4] United States v. White, 4 Washington, 414.

[5] Saltenberry v. Loucks, 8 La. An. 95.

Where the law concerning school funds required the county court to keep the bonds for the loan of such funds, and to renew bonds and pass upon the sufficiency of the same, it was held that if by order or permission of the court these duties devolved upon the county treasurer, and any loss happened thereby, the sureties of the treasurer were not liable therefor. The sureties are presumed to have contracted with reference to the law, and to hold them responsible for other duties than the law imposed on their principal, would be "a palpable violation of the letter and spirit of the contract."[1] A sheriff gave bond for the collection of taxes, the bond by mistake reciting that it was given for taxes levied under a law which had in fact expired years before. Held, the sureties were not liable for taxes collected by the sheriff during the current year.[2] The sureties for the faithful discharge by an ordinary of his duties, are not liable to one who claims to be the lowest bidder for building a bridge, because of the act of the ordinary in awarding the contract to another.[3]

§ 452. **Cases holding surety on official bond liable for particular acts of principal.**—The bond of a deputy collector of internal revenue, provided that he should pay over all moneys that might come into his hands by virtue of his office." He collected some internal revenue before it was payable, and failed to pay it over: Held, the money was received by virtue of his office, and his sureties were liable therefor.[4] Where a county clerk fraudulently countersigned and filled up a warrant upon the treasury which had been signed in blank by the chairman of the board of supervisors, and then drew the money on such order, it was held that while this was a misuse of his official authority, it was nevertheless an official act for which the sureties on his official bond were liable.[5] The bond of a city clerk provided that he should faithfully discharge the duties of his office. The clerk, under color of his office, filled up and signed certain city orders (which had been signed in blank by the mayor), made them payable to himself, presented them to the treasurer, and procured the money

[1] Nolley *v.* Calloway County Court, 11 Mo. 447, per Napton, J.

[2] Branch *v.* Commonwealth, 2 Call (Va.) 510.

[3] Smith *v.* Stapler, 53 Ga. 300.

[4] Fuller *v.* Calkins, 22 Iowa, 301.

[5] People *v.* Treadway, 17 Mich. 480. As to when the bond of a tax collector covers money received by him for licenses, see State *v.* Hampton, 14 La. An. 690. As to the liability of the surety of the committee of a lunatic, see Joyner *v.* Cooper, 2 Bailey Law (So. Car.) 199.

by the sheriff, though it was a part of his official duty to cause such advertisements to be made, for neglect of which his sureties would have been responsible. "The printer who publishes the notices does his work for the sheriff, and not for the parties. His position is no better than that of a sheriff's deputy, or of one who lets to him a horse or vehicle to enable him to execute process. It does not follow because the duty to advertise is official, the duty to pay is also official."[1] A sheriff collected on execution the printer's bill for advertising the property, and failed to pay it over. Held, the sureties on his official bond were not liable for such default. The court said that the amount of the printer's bill depended on the contract between him and the sheriff, and therefore was not fees. The printer would collect it from the sheriff whether the sheriff collected it from the defendant or not. The printer's bill is like a tavern bill made in transporting a prisoner, or other expense which the sheriff may have taxed as necessary outlay, but nothing can be collected therefor, except through the sheriff.[2]

§ 455. **Surety of treasurer liable for interest on public money received by him.**—It has been held that a county treasurer is liable to the county for interest received on deposits of county funds. His liability arises not only from his fiduciary relation, but from the fact that the interest belongs to the county and comes into his hands as county treasurer, and the sureties on his official bond are also liable for such interest. "The notion that a public officer may keep back interest which he has received upon a deposit of public money, is an affront to law and morals, for if done with evil intent, it is nothing less than embezzlement."[3]

§ 456. **Whether surety of officer liable for penalties incurred by officer.**—The bond of a county clerk was conditioned that he should well and truly perform all such duties as were or might be required of him by law during the time he was clerk. The clerk issued a marriage license to a minor without the proof required by law, and thereby became liable for a penalty of $500, for which judgment was recovered against him, but the same remaining

[1] Commonwealth *v.* Swope, 45 Pa. St. 535, per Strong, J.

[2] Allen *v.* Ramey, 4 Strob. Law (So. Car.) 30.

[3] Supervisors of Richmond Co. *v.* Wandel, 6 Lansing (N. Y.) 33 per Gilbert, J.

unsatisfied, suit was brought against the sureties on his official bond. By law, one half of the penalty went to the party suing, and the other half to the state. Held, the clerk was subject to the penalty, but no one was injured, and consequently no one could recover against the sureties on the bond.[1] The twelve per cent. penalty given by the Illinois school law for the failure of the collector to pay over school taxes on presentation of the county clerk's certificate and demand of the township treasurer, may be recovered of the collector and his sureties in an action of debt on his bond. This was held to be so, although the statute spoke only of a judgment to be rendered against the collector for such penalty.[2] It has been held that the sureties of a sheriff are not liable for penalties imposed on him by statute for not returning executions, etc.[3]

§ 457. **Surety on official bond discharged if injured by act of obligee.**—As a general rule, the sureties on an official bond will be discharged by any unauthorized dealings between the principal and obligee, which varies their situation or increases their risk. Thus, where a constable collected money on execution and tendered it to the creditor, who did not take it, but told the constable he might keep it for several weeks or months, it was held the sureties on the constable's official bond were discharged from all liability on account of such money. The Court said: "The effect of letting the money remain in the hands of the constable, whether it be considered as a loan or accommodation, placed the the plaintiff in execution and the constable in a new relation, to which the surety was neither privy nor party. The plaintiff should not have been liberal at the expense of the security. * The plaintiff, in agreeing to leave his money in the officer's hands, in effect loans him the money, puts the security in great jeopardy and seriously injures him."[4] If a collector of internal revenue consents to the use of the public money by his deputy collector, in his private business of buying and speculating in grain, it will be a fraud on the sureties of the deputy, and will discharge them from liability on his bond for a defalcation on his

[1] Brooks *v.* The Governor, 17 Ala. 806.

[2] Tappan *v.* The People, 67 Ill. 339.

[3] Treasurers *v.* Hilliard, 8 Richardson Law, (So. Car.) 412; see, also, on this subject, State *v.* Harrison, Harper Law (So. Car.) 83.

[4] Wells *v.* Grant, 4 Yerg. (Tenn.) 491, per Peck and Green, JJ.

part resulting from it.[1] Where goods levied on by a sheriff are sold under an agreement of the parties in a mode wholly unknown to the due execution of a *fieri facias*, the parties cannot hold the sheriff officially responsible, and thereby charge the sureties on his official bond with his defaults in that regard.[2] Certain county commissioners appointed one B collector of taxes, and issued the tax warrant and duplicate to him, but he failed to give bond. C was then appointed collector, and gave bond with sureties, and collected taxes, and paid over such sums as he received. B also collected taxes, which he failed to pay over. C's sureties were sued on their bond for the taxes collected by B, and it was claimed that as they were by their bond liable for the collection of the taxes by C, they were liable for all the taxes, no matter by whom they were collected. Held they were not liable for the taxes collected by B, because the commissioners, by their act had enabled B to collect such taxes as he collected, and the parties who had paid B, thus having the apparent authority to collect the taxes, could not be forced to pay them again.[3] Where certain heirs, by an act under private signature, regulated between themselves the mode of partition of an estate, and authorized the curator to pay certain claims, and further verbally authorized him, in order to save expense, to settle the affairs of the estate out of court, it was held that the sureties of the curator were not discharged, because nothing had been done but what the court would have ordered done if there had been no interference.[4]

§ 458. **When surety of sheriff liable for acts done by him after termination of his office.**—Important questions frequently arise with reference to the liability of sureties of public officers for the acts or defaults of such officers after the expiration of their term of office. These questions usually turn upon the law in force at the time, the wording of the bond, and the circumstances under which the acts are done or defaults committed, and these, of course, greatly vary. The subject will be best illustrated by a review of the cases in which it has been discussed. Thus, by law, the office of constable was for one year, but they were to

[1] Pickering *v.* Day, 3 Houston (Del.) 474.

[2] Webb *v.* Anspach, 3 Ohio St. 522. Holding that the sureties of a county treasurer are discharged if the county commissioners take his note and a mortgage on land in payment for his defalcation, see Goodin *v.* The State, 18 Ohio, 6.

[3] Cannell *v.* Crawford Co. 59 Pa. St. 196.

[4] Perkins *v.* Cenas, 15 La. An. 60.

hold till their successors were elected and qualified. A constable's bond recited that he had been elected constable "for the term of one year, and until his successor * (should) be elected and qualified," and provided that he should faithfully discharge the duties of the office. He was elected for a second term, and continued to exercise the office, but failed to qualify for such second term by giving a new bond and taking the oath of office. Held, his sureties for the first year were liable for his defaults committed during the second year, on the ground that by law the constable held under his first election, till his successor was elected and qualified, and his sureties were liable for his acts during such time.[1] A statute provided that where an execution came to the hands of a constable, and his term of office afterwards expired, he should proceed the same as if his office had not expired, and that his sureties should be liable for all money so collected. Held, that the sureties of a constable, during the term in which he received an execution, were liable for money collected by him thereon during a subsequent term for which he had given a new bond with different sureties. The court said that but for the statutory provision, the sureties on the second bond would have been liable.[2] Accordingly it has been held that the sureties on a sheriff's bond, are liable for his failure to pay over money received by him in his official capacity during the term of office covered by their bond, although the money arose from a partition sale made by him during a previous term covered by a bond with different sureties.[3] By statute a party whose land was sold on execution, had the right to redeem it within twelve months, by paying the officer who made the sale the amount of the purchase money. A sheriff, after the expiration of his office, received money in redemption of land sold by him while in office. Held, the receipt of the money was part of the duties of the sheriff, for which his sureties were responsible.[4] A sheriff held office for two terms, giving different sets of sureties for each term. Held, the sureties for the first term were liable for money realized from a sale of property levied on during the first term but not sold till the second term.[5] But if the sheriff re-

[1] Butler v. The State, 20 Ind. 169.

[2] McCormick v. Moss, 41 Ill. 352.

[3] Ingham's Admrs. v. McCombs, 17 Mo. 558. See, also, on this subject, Warren v. The State, 11 Mo. 583.

[4] Elkin v. The People, 3 Scam. (Ill.) 207.

[5] Tyree v. Wilson, 9 Gratt. (Va.) 59.

ceives the execution after the expiration of his term of office, it has been held that his sureties for that term are not liable for money realized from such execution, even though no successor of the sheriff has qualified and he is acting as sheriff *de facto*.[1] Where judgment of ouster from office was given against a sheriff, but no writ of discharge was issued, and afterwards an execution was placed in his hands on which he made the money, it was held that his sureties were liable for such money, as the same was received by him *colore officii* and he remained *de facto* in possession of the office.[2] So it has been held that the sureties of a constable are liable for money collected by his deputy, after the constable has forfeited his office by removal from the state.[3] But where a sheriff was actually removed from office, it was held that his sureties were not liable for any of his subsequent acts.[4] The constitution of a state provided that a sheriff might be required to renew his bond from time to time, and in default of his so doing his office should be deemed vacant. A statute provided that he should renew his bond yearly, but did not expressly say his office should be vacant if he did not so renew it. A sheriff failed to renew his bond, and afterwards, during the term of office for which he was elected, made default. Held, the sureties on his original bond were liable therefor, as he remained sheriff *de facto* by virtue of his election.[5] The sureties of a sheriff are liable for money made by him on legal process during his official term, although it is not demanded by the party entitled thereto until after the expiration of such term. The obligation of payment accrues during the term of office, and remains after the expiration of such term.[6]

§ 459. **Cases holding surety of officer liable for his acts after expiration of his official term, etc.**—A county treasurer did not turn over his office to his successor till one day after his term of office expired, and on that day, after the expiration of his office,

[1] Cuthbert *v.* Huggins, 21 Ala. 349. To the effect that the sureties of a sheriff who has an execution in his hands for five months before going out of office, but makes no levy, and after going out of office receives the money, are not liable for such money, see McDonald *v.* Bradshaw, 2 Kelly (Ga.) 248.

[2] Kent *v.* Mercer, 12 Up. Can. C. P. R. 30.

[3] State *v.* Muir, 20 Mo. 303.

[4] Dixon *v.* Caskey, 18 Ala. 97.

[5] Dunphy *v.* Whipple, 25 Mich. 10.

[6] King *v.* Nichols, 16 Ohio St. 80; Brobst *v.* Skillen, 16 Ohio St. 382.

he received certain moneys in his official capacity. Held, the sureties on his official bond were liable for the moneys thus received, on the ground that he was *de facto* the treasurer, and the sureties would not be permitted to set up that he was not treasurer *de jure*.[1] Where a commissioner in equity after he had resigned his office, and before a successor had been appointed, received money on a bond, which he had taken as commissioner, it was held his sureties were liable for the money thus received.[2] Where the money and property of an infant without a guardian was ordered by a decree of a county court to be paid over to a clerk of that court, to be by him invested and managed under the direction of the court, and for the use of the infant, and the statute provided that his official bond should be liable for the duties enjoined by the court in relation to the property, it was held that the sureties on his bond when the order was made were liable for money received by him after his term of office had expired, as he received it by virtue of the order made while they were liable.[3] Where a bond was given by the agent of an unincorporated joint stock company to the directors for the time being, conditioned for the faithful performance of his duties, etc., and the directors were appointed annually, and changed before a breach of the condition of the bond, the agent and his sureties are liable in an action brought by the obligees in the bond for a breach happening after such obligees went out of office. "It is true the directors of this company are elected annually, but the company has not said that the agent shall be for one year only; his appointment is during pleasure. The sureties do not become sureties in consequence of their confidence in the directors, but of their confidence in the agent whose sureties they are."[4]

§ 460. **Cases holding surety on official bond not liable for acts of officer after expiration of his term.**—A civil officer has a right at any time to resign his office, and after his resignation has been received at the proper department, his surety is not, as a

[1] Placer Co. *v.* Dickerson, 45 Cal. 12.

[2] State *v.* Bird, 2 Richardson Law (So. Car.) 99.

[3] Latham *v.* Fagan, 6 Jones Law (Nor. Car.) 62.

[4] Anderson *v.* Longden, 1 Wheaton, 85, per Marshall, C. J. For a case holding under peculiar circumstances that the bond of a deputy collector covered acts done after a subsequent appointment of the collector, see Delacour *v.* Caulfield, 1 Irish Com. Law R. 669.

general rule, liable for any of his subsequent acts.[1] A township trustee gave bond for his acts during one year, and till his successor should be elected and qualified. His successor was elected and qualified, and the next day the old trustee borrowed money on the credit of the township: Held, his sureties were not liable therefor. He was then neither an officer *de facto* nor *de jure*.[2] So it has been held that the sureties on the official bond of the trustee of the jury fund are not liable for money received by him after the expiration of his term of office, even though he is still holding the office when he receives the money.[3] The bond of an auctioneer provided that he should perform his duty to all persons who should employ him as such "during his continuance in office." He received goods and advertised them for sale during his official term, and sold them in pursuance of the notice the day after his term expired: Held, his sureties were not liable for the proceeds of the sale.[4] A constable's official term being a year, a note was put into his hands in the year 1823, and he received the money due on it in 1825: Held, his sureties for 1823 were not liable for the money so received.[5] Where money was paid to the deputy of a clerk and master in chancery after the term of such clerk and master had expired, but while he was still filling the office without any new appointment or new bond, it was held that the sureties on the official bond of such clerk and master were not liable for the money so paid.[6] The sureties on the official bond of a school district collector have been held not liable for his refusal to pay over, upon order of the district trustees, moneys received during a term of office which had expired at the time the order was made, and with respect to which expired term the bond was given; the reason being that the default did not occur during the term for which the sureties were liable.[7] A county treasurer was elected for two years, and gave bond with sureties for the performance of his duties during the period for which he was elected, and until the election and qualification of his successor. Before the expiration of the term it was extended by the legisla-

[1] United States *v.* Wright, 1 McLean, 509.

[2] Steinback *v.* The State, 38 Ind. 483.

[3] Offutt *v.* Commonwealth, 10 Bush (Ky.) 212.

[4] Florance *v.* Richardson, 2 La. An. 663.

[5] Governor *v.* Coble, 2 Dev. Law (Nor. Car.) 489.

[6] Holloman *v.* Langdon, 7 Jones Law (Nor. Car.) 49.

[7] Overacre *v.* Garrett, 5 Lansing (N. Y.) 156.

ture for about three months, and no new bond was given by the treasurer: Held, the sureties were not responsible for the official conduct of the treasurer during the time for which the term was extended. The legislature had no power to extend their liability beyond the precise terms of their contract, and the words of the bond must be understood to refer to the law as it was when the obligation was entered into.[1]

§ 461. **When surety on old bond of officer discharged if under requirement of statute he give new bond.**—Where a statute provides that an officer who has already given bond and is exercising an office, may be required to give a new bond, but does not make provision for the discharge of the sureties on the old bond, the giving of such new bond does not, as a general rule, discharge the sureties on the old bond.[2] Where, in such case, such second bond is given, the sureties thereon may be sued for a default of the principal before any suit is brought against the sureties on the first bond.[3] The curator of an estate having given bond, committed a default and was afterwards ruled to give, and gave, a new bond with different sureties; the effect of which new bond was, by statute, to discharge the first sureties from all future, but no past, liability. The curator carried the amount of the defalcation into his accounts, after giving the new bond, so as to render the sureties thereon liable for the same, and judgment was had against them therefor. Held, the sureties on the first bond were liable for all defaults of the curator which were actually committed while they were sureties, even though judgment for the same default had been recovered against the sureties on the second bond.[4] A statute provided that if the surety of a guardian desired to be released, he should take certain steps, and "if a guardian shall give new bond, when ru ed to do so by the court, his former security shall not be bound for any act of his thereafter." Upon proper proceedings, the county court ordered a surety on a guardian's bond to be discharged "from all

[1] Brown *v.* Lattimore, 17 Cal. 93.

[2] People *v.* Curry, 59 Ill. 35, with reference to bond of administrator. To similar effect, with reference to bond of guardian, see Hutchcraft *v.* Shrout, 1 T. B. Mon. (Ky.) 206; Commonwealth *v.* Cox's Admr. 36 Pa. St. 442; Jones *v.* Blanton, 6 Ired. Eq. (Nor. Car.) 115; and with reference to bond of testamentary trustee, Commonwealth *v.* Risdon, 8 Philadelphia, Pa. 23; see, also, Wood *v.* Williams, 61 Mo. 63.

[3] Pinkstaff *v.* The People. 59 Ill. 148.

[4] State *v.* Drury, 36 Mo. 281.

loss and damage," a new bond being executed. Held, the surety was discharged from all liability on account of what had before occurred, as well as of what might thereafter occur.[1] Under a similar statute it has been held, that the surety was discharged by the mere fact of the new bond being given without any order of court discharging him.[2] A statute provided that the sureties of a justice of the peace might give notice that they were no longer willing to be bound for him, and that if he should give other security "to the satisfaction of the trustees," his first sureties should be discharged. Such a notice having been given by the first sureties of a justice, he procured other persons to subscribe their names to his official bond, but no seals were attached to their names, nor were such names contained in the body of the bond. Held, the first sureties were not discharged. "No other security was given; none at all."[3] Part of the sureties on the official bond of a county treasurer applied for and obtained a discharge from liability as such sureties under a statute making provision therefor, and the treasurer gave a new bond. A default occurred after the discharge of the sureties aforesaid, and it was held that the remaining sureties on the first bond were not liable therefor. The court said that the discharge of any one of the sureties so altered the contract as to discharge all the others.[4] Where a statute provides that sureties on an official bond may be discharged by proceedings before certain persons, the proceedings must be had before the persons who, at the time of the proceedings, have the right to grant such discharge, and not before the persons who had the power to grant the discharge when the bond was given, if such persons have been changed in the meantime.[5]

§ 462. **Liability of surety on second bond for same term of officer.**—When an officer during his term gives an additional

[1] Watts v. Pettit, 1 Bush (Ky.) 154; Moore v. Potter, 9 Bush (Ky.) 357.

[2] Lane v. The State, 27 Ind. 108; see, also, on this subject, United States v. Wardell, 5 Mason, 82.

[3] Stevens v. Allmen, 19 Ohio St. 485, per Brinkerhoff, C. J. 485.

[4] People v. Buster, 11 Cal. 215.

[5] People v. Evans, 29 Cal. 429. Holding that sureties on different bonds of an administrator, when their liability is the same, may be sued together in the same suit, see Powell v. Powell, 48 Cal. 234. Holding that where several sureties sign an official bond, each binding himself "severally for the sum and the sum alone" set opposite his name, a joint action cannot be maintained against them for the amount of the bond, see State v. Powers, 52 Miss. 198.

bond in pursuance of the requirements of a statute or otherwise, whether the sureties in the last bond are liable for any default happening before the time they signed, often becomes an important question. Where a statute provided that upon application by the sureties of an administrator he might be required to execute "a further bond for the performance of the condition of the former bond," and such a bond was given with such a condition, it was held that the surety on such last bond was liable for all defaults of the guardian occurring both before and after the execution of such last bond.[1] But where under the same statute a new bond was given by an executrix, conditioned that she would "well and truly and faithfully perform the duties and trusts committed to her as executrix," it was held that the surety in such new bond was only liable for subsequent defaults of the executrix.[2] Where a guardian was ordered by the probate court to give supplemental security and a new surety, in pursuance of such order signed the old bond of the guardians, it was held that he thereby became liable for all acts of the guardian from the time the bond was first executed.[3] A sheriff collected money on execution, and renewed his bond before the money was demanded of him. The condition of the bond provided that the sheriff should "well and truly perform all and singular the duties of sheriff, as enjoined on him by the laws of * (the) state, and pay over all moneys collected by him by virtue of his office as required by law." Held, that if the sheriff appropriated the money to his own use after the making of the last bond, the sureties thereon were liable for such money.[4] A justice of the peace collected money by virtue of his office, and was afterwards elected his own successor, and gave a new bond. Afterwards the sureties on his new bond applied to be discharged, and they were ordered so to be upon a new bond being given, which was done, conditioned to pay all money that might come into the hands of the justice "by virtue of his office." Held, the sureties on this last bond were not liable for the money so collected.[5]

[1] Armstrong *v.* The State, 7 Blackf. (Ind.) 81. To similar effect, see Steele *v.* Reese, 6 Yerg. (Tenn.) 263; Treasurers *v.* Taylor, 2 Bailey Law (So. Car.) 524. See, also, Enicks *v.* Powell, 2 Strobh. Eq. (So. Car.) 196.

[2] The State *v.* Hood, 7 Blackf. (Ind.) 127.

[3] Ammons *v.* The People, 11 Ill. 6.

[4] The Governor *v.* Robbins, 7 Ala. 79.

[5] Thompson *v.* Dickerson, 22 Iowa, 360.

§ 463. **Liability of sureties on different bonds of same officer for same term.**—A postmaster gave a bond conditioned for his good behavior in office, and while still in office gave another bond, with other sureties, but with the same condition as the first, and afterwards continued in the office. Held, that giving the second bond did not release the sureties in the first, but the sureties in both bonds were equally liable for all defaults of the principal occurring after the second bond was given.[1] The sureties on the second bond of an officer may lawfully stipulate in the instrument that they shall not be liable until all the remedies on the first bond are exhausted.[2] In June, 1854, H was elected sergeant of a city for three years, and gave bond with sureties in the sum of $30,000, conditioned that he should faithfully "discharge the duties of his said office." Afterwards, as the law permitted, he was in 1855 required to give a new bond, and did so in the sum of $60,000, with other sureties, both bonds having the same condition. Twenty days before the last bond was given, the sergeant received money which he did not pay over. Held, the sureties in both bonds were equally liable for his default, the breach of the bonds consisting not in receiving the money, but in failing to pay it over.[3] The treasurer of a collectorate was found to have been a party with others in embezzling government moneys in his collectorate, the defalcations extending over several years. A bond with surety had been given for the collector's acts, and three renewal bonds had been signed by the same surety during the period the treasurer was in office, but the surety did not ask that the old bonds should be delivered up to him when the renewal bonds were given. Held, the renewal bonds did not discharge the surety from his liability under the first bond.[4] It has been held that the sureties on the general bond of a county treasurer are not liable for his failure to pay over moneys collected by him on account of school and university lands, where there is a statute requiring a special bond with reference to such lands, and such a

[1] Postmaster General *v.* Munger, 2 Paine, 189.

[2] Harrison *v.* Lane, 5 Leigh (Va.) 414. To the effect that the court may require a new bond, which, as between the sureties thereon and the sureties on an old bond of the same administrator, shall be the primary security, see Glenn *v.* Wallace, 4 Strob. Eq. (So. Car.) 149.

[3] Corprew *v.* Boyle, 24 Gratt. (Va.) 284.

[4] Lalla Bunseedhur *v.* The Bengal Government, 14 Moore's Indian. Appls. 86.

bond is given.[1] It has been held that the sureties on a guardian's general bond, and on a bond given by him upon sale of the ward's real estate, are all liable for the proceeds of such sale. The latter are liable because they expressly agreed to become so, the former because when the money was realized it became the personal estate of the ward, which their bond covered.[2]

§ 464. **When officer holds for several terms, surety during time when default occurs liable.**—When an office has been held by the same person for two or more terms with different sets of sureties for each term, and a defalcation or dereliction of duty occurs on the part of the officer, as a general rule those sureties only will be liable who were bound for his acts at the time such defalcation or dereliction of duty occurred. Thus, a master in chancery was elected four times successively, and gave bonds each time with different sureties. Held, that where he was ordered by the court to invest funds in his hands and neglected to do so, the sureties then liable were responsible for his neglect. So, where he failed to deposit in bank as ordered by the court, his sureties for that term were liable.[3] A party was elected county treasurer for two years and gave bond as such. He was re-elected to the same office for the two years next following, and continued in the office, but did not qualify or give a new bond. Held, the responsibility of the sureties ceased at the end of the first term.[4] A party was collector of taxes for the year 1854, and also for the years 1855 and 1856, and gave bonds with different sureties for each year. He appropriated to his own use, and never accounted for, part of the money collected for 1854. In 1857 the town authorities appropriated from money received on the assessments of 1855 and 1856 a sum to make up the defalcations of 1854, and the sureties for 1854 being sued for the default, set up the above facts as a defense. Held, they were no defense, and

[1] State *v.* Young, 23 Minn. 551.

[2] Elbert *v.* Jacoby, 8 Bush (Ky.) 542. Holding, under peculiar circumstances, the sureties of a school commissioner liable for money in the hands of their principal during the period covered by their bond, where several bonds have been given during the principal's term, see Miller *v.* County of Macoupin, 2 Gilman (Ill.) 50.

[3] Street *v.* Laurens, 5 Richardson Eq. (So. Car.) 227. Holding that the sureties on a sheriff's bond when he receives money are liable for such money, although the property from the sale of which it was realized was sold during a previous term, see State *v.* McCormack, 50 Mo. 568.

[4] County of Wapello *v.* Bingham, 10 Iowa, 39. To similar effect, see People *v.* Aikenhead, 5 Cal. 106.

the appropriation so made did not discharge such sureties and throw the burden on the sureties for other years.[1]

§ 465. **When bill of discovery to ascertain time of defalcation may be brought against principal and different sets of sureties.**—When a guardian is charged by his ward with having been guilty of a misuse of the ward's funds, and he has given different bonds during his guardianship, with additional or different sureties, a suit in chancery will be sustained against the guardian, and the different sets of sureties for a discovery of the amount of the funds misused, and the time when the misuse occurred, in order to charge each set of sureties according to their respective liabilities on the bonds signed by them. But in order to give equity jurisdiction, the bill must charge the total or partial insolvency of the guardian.[2]

§ 466. **When surety on bond for second term of officer liable for money received by him during first term.**—Where an officer has held an office for two or more successive terms, and has given bonds for each with different sets of sureties, if money received by the officer was received by him "prior to the execution of the bond on which the suit is brought, and the money has been used by the principal to his own use, or so disposed of by him that he does not have it on hand, either in bank or otherwise, this constitutes a dereliction of duty, and * for such dereliction the sureties on his official bond subsequently executed are not liable, unless the bond is retrospective in its language, so as to include prior derelictions of duty. On the other hand, where a public officer having received public moneys prior to the execution of his official bond, still has such moneys on hand when the bond is executed, the sureties thereon become responsible for the proper disposition" of such moneys.[3] Where the official bond of a clerk of

[1] Porter v. Stanley, 47 Me. 515. Holding that the surety on the general bond of a deputy assessor is liable for his acts after his reappointment, when he would have continued to hold the office without any new appointment, see Kruttschnitt v. Hauck, 6 Nevada, 163.

[2] McDougald v. Maddox, 32 Ga. 63. To a similar effect, see Woods v. Woods, 7 Ga. 587; Alexander v. Mercer, 7 Ga. 549.

[3] Independent School District of Montezuma v. McDonald, 39 Iowa, 564, per Miller, C. J.; State v. Sooy, 39 New Jer. Law (10 Vroom) 539; Bissell v. Saxton, 66 New York, 55; Freeholders of Warren v. Wilson, 1 Harrison (N. J.) 110; Pinkstaff v. The People, 59 Ill. 148; Miller v. Moore, 3 Humph. (Tenn.) 189; Bales v. The State, 15 Ind. 321; Rochester v. Randall, 105 Mass. 295.

the county board of supervisors, for his second successive term, was conditioned that he should "faithfully perform all the duties of said office, and * pay over all moneys that * (might) come into his hands as such clerk as required by law," it was held that the sureties on such bond were liable for money received by the clerk during his first term, and actually in his hands when his second term commenced, and which he, therefore, received as his own successor, but they were not liable for money received by him during his first term, and misapplied or embezzled by him during his first term.[1] Where a sheriff received an execution during his first term, but failed to return it, as provided by law, and such failure occurred during his second term, it was held that the sureties for his second term were liable for this default, because it occurred during the term for which they were bound.[2] A master in chancery, while a certain set of sureties were liable, used money belonging to his office in speculation. Afterwards, and after the liability of the sureties as to future defaults had ceased, the master received the amount back in money and good notes, but it did not appear that he placed it in the fund from which he took it. Held, the sureties were liable for the full amount, as the breach of the bond consisted in using the money, and there was nothing to mitigate the damages.[3] Where taxes were received by a collector during his first term, and he failed to make a report of his acts and settle with the authorities when required by law, before the expiration of his term, and he was re-elected and gave a new bond, it was contended that it would be presumed he paid over the funds to himself as his own successor, and that the sureties on his second bond only were liable. Held, the sureties on the first bond were liable, because the collector had failed in the statutory requirement to make a report of his acts and settle with the authorities during the term for which they were bound.[4]

§ 467. **When surety for last term of officer liable for previous defalcation—Presumptions, evidence, etc.**—A supervisor was elected for a second term, and at the end of his first term

[1] Vivian *v.* Otis, 24 Wis. 518. To similar effect, see Townsend *v.* Everett, 4 Ala. 607; Dumas *v.* Patterson, 9 Ala. 484. To a contrary effect, see Newman *v.* Metcalfe Co. Ct. 4 Bush (Ky.) 67.

[2] Sherrell *v.* Goodrum, 3 Humph. (Tenn.) 419.

[3] White *v.* Smith, 2 Jones Law (Nor. Car.) 4.

[4] Coons *v.* The People, 76 Ill. 383.

made a report, showing a certain amount in his hands belonging to the town, which report was approved. Held, the sureties in his second bond were liable, even though the default for which they were sued had actually occurred during his first term. The supervisor's annual report being approved, must be presumed to be true. The sureties in the second bond must be presumed to have had knowledge of the report when they became liable, and the money was at that time in contemplation of law, in the hands of the supervisor.[1] Where a commissioner in equity, who was re-elected, had during his first term, received moneys which had not been demanded or ordered to be paid over or invested during that term, it was held that the sureties on the bond for his first term were not liable for such money, unless it was shown that the commissioner had converted the funds during his first term, and that in the absence of such proof the presumption was that he retained the funds, and that they were in his hands as his own successor, when his second term commenced.[2] Where there were two consecutive commissions to an Indian agent, and a different set of sureties for each term, it was held the last set of sureties were responsible for all money which remained in the hands of the principal at the expiration of the first commission. If it was misapplied during the first term of office, the burden was on the second set of sureties to show that fact.[3] Where an officer has held office for several terms, and been guilty of a defalcation, it has been held that in the absence of all evidence as to when the defalcation occurred, it would be presumed that it occurred during his last term.[4]

§ 468. **Liability of surety when principal pays defalcation of one term with money received during another term.**—Where the same person was collector of taxes for two successive years, and paid the arrears of taxes collected on the tax list of the first year with the money collected on the tax list of the second year

[1] Morley *v.* Town of Metamora, 78 Ill. 394. This case seems to be opposed in principle to the decided weight of authority on the subject, as will appear from cases cited elsewhere in this chapter, and in the chapter on Evidence. See, also, on this subject, Beyerle *v.* Hain, 61 Pa. St. 226.

[2] Vaughan *v.* Evans, 1 Hill Eq. (So. Car.) 414.

[3] Bruce *v.* United States, 17 Howard (U. S.) 437. To contrary effect, see Justices *v.* Woods, 1 Kelly (Ga.) 84; Bryant *v.* Owen, 1 Kelly (Ga.) 355.

[4] Kelly *v.* The State, 25 Ohio St. 567. To similar effect, see Kagy *v.* Trustees, etc. 68 Ill. 75.

(the authorities not knowing whence the money came), and failed to perform the condition of his official bond for the second year, it was held that the sureties on this bond were liable to the extent of the default, and were not entitled to deduct the amount so paid by him out of the proceeds of his second term to the payment of the defalcation of the first term. It was the same as if the collector had paid out the money collected during his second term for any of his private debts.[1] One became surety for the good conduct of the cashier of a bank upon his reappointment to that office. Before such reappointment he had been guilty of frauds on the bank. Afterwards, and previous to an examination by the directors of the bank into the state of their cash, he borrowed money as such cashier, which he placed in the bank, and :hus concealed his prior defalcations. After such examination, ıe took out the said moneys and repaid those from whom he had ›orrowed them. Held, the surety on the last bond was liable for he default. When the moneys borrowed were placed in the aults of the bank they became its property, and a subsequent aying of the persons from whom the moneys were borrowed out f the funds of the bank was a breach of the bond then in force.[2] ., being township collector for 1872, received $5,000, school oney, which he did not pay over. He was also collector in 373, and was as such entitled to receive $5,000 for schools for e county from B, the county collector. A and B met, and B ve A his check for $5,000, and A gave B his check for the ,000 due for 1872, but with the understanding that A's check ɔuld not be presented for payment until A had time to deposit ; check. Held, that if the money collected in 1872 was ually squandered by A in 1872, his sureties for that year were ponsible for it, and the burden could not be thrown on the eties for 1873 by any such contrivance. The court said: ureties for the fidelity of a person in an office of limited dura- ı, are not liable beyond that period, nor are they liable for past ıults unless made so in terms."[3] Where a city treasurer had l office for several terms, and during a former term made ɜ entries of payments, which payments he actually made from

ıhabitants of Colerain *v.* Bell, 9 (Mass.) 499; Gwynne *v.* Burnell, rk & Finnelly, 572.

ıgraham *v.* Marine Bank, 13 Mass.

[3] Patterson *ats.* Inhabitants of Township of Freehold, 38 New Jer. Law, 255, per Van Syckel. J.

city money during his last term, it was held that the sureties on the bond for his last term were not liable for the sums thus paid out by him. The court said that the sureties on an official bond were only liable for the defaults of their principal occurring during the term for which their bond was given, and they could not be prejudiced by the false entries of their principal made during a previous term.[1] A township treasurer who was elected for a second year, had been guilty of a default during his first term, which was not known when he was re-elected. During his second term he paid out all the money he then received, and more. It was contended that the town had the right to apply the money paid out during the second term to the oldest default, and hold the sureties for the second term liable. Held, this could not be done, and the sureties who were bound when the default actually occurred were liable therefor.[2]

§ 469. **When sureties of officer liable for duties afterwards imposed upon him—Change of duties, etc.**—As a general rule, the sureties on an official bond are liable for the faithful performance of all duties imposed upon such officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belonged to and come within the scope of the particular office. They are not, however, liable for after imposed duties, which cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed.[3] A commissioner for the loan of money of the United States, deposited with the state of New York, under the act of 1837, gave bond, with sureties, for the performance of his duties. Afterwards, and during his continuance in office, the fund in his hands was, by act of the legislature, increased $500, by the transfer of another fund to it. He afterwards became a defaulter. Held, his sureties were not discharged by such increase. The court said: "The legislature have power at any and all times to change the duties of officers, and the continued existence of this power is known to the officer and his sureties, and the officer ac-

[1] Detroit *v.* Weber, 29 Mich. 24.

[2] Paw Paw *v.* Eggleston, 25 Mich. 36.

[3] Governor *v.* Ridgway, 12 Ill. 14; Skillett *v.* Fletcher; Compher *v.* The People, 12 Ill. 290; The People *v.* Tompkins, 74 Ill. 482; Smith *v.* Peoria County, 59 Ill. 412. Holding, that changing the time of holding the court in which judgment may be got for taxes, does not discharge the sheriff; see People *v.* McHatton, 2 Gilman (Ill.) 731. See, also, People *v.* Blackford, 16 Ill. 166.

cepts the office, and the sureties execute the bond with this knowledge. It is, I think, the same in effect as though the power was recited in the bond." The sureties are not discharged by the alteration of the duties of the officer "so long as the duties required are the appropriate functions of the particular officer." All such alterations are within the contemplation of the parties executing the bond. Imposing on the officer duties of another description, and not appropriate to the office, not being a matter within the contemplation of the sureties, would discharge them.[1] Where, after a constable's official bond had been signed, the jurisdiction of the court in which he was constable was increased, and new duties in addition to the old were imposed on him, it was held that his sureties were liable for an act afterwards done by him in pursuance of the old authority.[2] But where a bond was executed by G, and sureties, conditioned for indemnifying the high sheriff of a county against liability for misconduct of G as deputy bailiff, and after the execution of the bond, the jurisdiction of the county court was extended and increased by statute, it was held that these statutes had so materially altered the nature of the office of bailiff, that the sureties were no longer liable for the conduct of G, even in a matter which had not been altered by the subsequent acts. The court said: "When the nature of the employment of the principal is so altered by the act, either of his employer or of the legislature, that the risk of his surety is materially altered, the surety has a right to say, 'I did not bargain for this risk. I am discharged.'"[3] A sheriff was by statute *ex officio* collector, and gave bond with sureties for the discharge of his duties. During his continuance in office, the law in force at the time of the execution of the bond was repealed, but all of its material provisions were incorporated into the repealing act. Held, the sureties were not discharged.[4] A sheriff being *ex officio* collector of the county levy, gave a bond, which, among other things, provided that he should "in all things well and truly demean himself and perform the duties of collector of the county levy." Subsequent to the execution of the bond, the legislature authorized an additional

[1] People v. Vilas, 36 New York, 459, per Grover, J. See, also, Commonwealth v. Holmes, 25 Gratt. (Va.) 771.

[2] Mayor of New York v. Sibberns, 3 Abbott's Rep. Om. Cas. 266.

[3] Pybus v. Gibb, 6 Ell. & Black. 902.

[4] People v. Leet, 13 Ill. 261.

county levy for the purpose of building a court house. Held, the sureties on the bond were liable for the money collected on this last levy.[1] The bond of a United States collector of customs was conditioned for the faithful discharge of "all the duties of said office, according to law;" afterwards, by statute, the duties and responsibilities of the collector were changed by statute, but the nature and general duties of his office remained the same. Held, that his sureties remained liable for all acts required of him under the old, as well as the new statutes. "Otherwise every increase in the rate of duties, every change in the manner of conducting the office, or rendering accounts or paying out the public money, would discharge the bonds of all the collectors of customs holding under the government."[2] The sureties of a postmaster are liable for an increased rate of postage imposed after the making of the bond.[3]

§ 470. **Liability of surety on official bond determined by reference to the law in contemplation when he signed.**—A bond was given in Alabama by the guardian of a minor, after the state had seceded from the United States and joined the Confederate States, and after the commencement of hostilities between the United States and the Confederate States, conditioned that the guardian should perform all the duties required of him by law: Held, that the "law" referred to in the bond was that of the then government of Alabama, and a compliance with that law discharged the sureties. That being the only law in existence at the time, was the only one the parties could have had in contemplation.[4] After a joint bond was executed by principal and surety, a statute was passed which provided that in a suit on a joint contract a judgment might be rendered against any of the defendants severally. Afterwards the surety died: Held, his estate could not be reached in equity, and the statute made no difference. Having been passed subsequent to the date of the bond, it could not prejudice the surety.[5] The surety of an administrator for his duties in selling the real estate of his intestate for the payment of debts, is not discharged from liability because the land is not sold for want of

[1] Commonwealth v. Gabbert's Admr. 5 Bush (Ky.) 438.

[2] United States v. Gaussen Exr. 2 Woods, 92, per Woods, J. Boody v. United States, 1 Woodbury & Minot, 150.

[3] Postmaster General v. Munger, 2 Paine, 189.

[4] Van Epps v. Walsh, 1 Woods, 598.

[5] Fielden v. Lahens, 6 Blatchford, 524.

bidders on the first or second order of sale, and is sold on the third order, on terms prescribed by the court, different from those originally prescribed. The court had a right to vary the terms of sale, and when the surety became liable, it was "with a full knowledge of the power of the court to continue the order of sale, and alter the terms of payment."[1] The sureties of a collector of public dues are not discharged by the fact that after they become bound the legislature changes the currency in which the dues may be paid. The sureties were in no manner prejudiced; and besides they must have known the legislature had power to change the revenue laws, and they contracted with reference to that.[2] The sheriff and his sureties are liable on his official bond, executed before the Code took effect, for his neglect to pay over money made on attachment process in a proceeding on a claim before it was due, which was authorized by the Code after the date of the bond.[3]

§ 471. **When surety liable, although tenure of office or mode of appointment of officer changed.**—A was appointed treasurer of a borough, the office then being annual, and gave a bond conditioned for accounting "during the whole time of A continuing in said office in consequence of said election, or under any annual or future election of the said council to said office." Afterwards, by statute, the office was changed, so that the tenure was during pleasure instead of annual. A continued to hold the office under successive appointments, and committed defaults while holding the office during pleasure. Held, the sureties were liable by the express terms of the bond. The office and the duties remained the same, and an annual accounting was still required. The tenure of the office only was changed.[4] It has been held that the surety of a deputy treasurer is not discharged by the fact that the manner of appointment of the treasurer is afterwards changed, where the deputy has continued to hold the office after an election of the treasurer under the new law, and subsequently made default.[5]

[1] Sawyers v. Hicks, 6 Watts (Pa.) 76.

[2] Borden v. Houston, 2 Texas, 594.

[3] King v. Nichols, 16 Ohio St. 80. See also, to the effect that a surety is only bound with reference to the law which he had in contemplation when he signed, Reynolds v. Hall, 1 Scam. (Ill.) 35.

[4] Mayor of Berwick v. Oswald, 1 Ell. & Black. 295; affirmed, Mayor of Berwick v. Oswald, 3 Ell. & Black. 653. To similar effect, see Mayor of Dartmouth v. Silly, 7 Ell. & Black. 97.

[5] Baby v. Baby, 8 Up. Can. Q. B. R. 76.

§ 472. **Discharge of surety by change in the emoluments of office, etc.**—Certain parties became bound as sureties of the sheriff of the parish of Orleans for the term of his office, which was two years. During that time the office of sheriff of the criminal court of New Orleans was created. This latter sheriff had the serving of all processes from said court, the keeping of the prison, the boarding of the prisoners, etc., which the sheriff of the parish formerly had. After this office was created, the sheriff of the parish received money which he did not pay over, and it was held that his sureties were not liable therefor. The creation of the new office had entirely changed the condition of the sheriff. The sureties did not agree to become bound for a sheriff performing such duties as were left to the sheriff of the parish. It was a change which they could not have foreseen, and they were discharged thereby.[1] But where during the term of office of a collector of a township the township was divided by statutory enactment and a new township made out of a portion thereof, it was held that this did not discharge the sureties on the collector's official bond, he continuing to act as collector of the portion of the township retaining the old name and organization, and the township remaining unchanged in its corporate character.[2] A change in the name of a collection district after the sureties of a deputy collector have become bound, will not discharge such sureties.[3]

§ 473. **When general bond of officer covers special fund collected or received by him.**—The bond of a tax collector provided that he should collect "all the taxes assessed in his county for the state and county purposes * according to the requisitions of law." When the bond was executed, the board of police had power to levy a special tax to build a court house, etc., and also had power to require therefor an additional bond from the tax collector. A special tax was levied to build a court house. This was collected by the collector, and no new bond was taken of him for it, although the sureties on his general bond requested that there should be. Held, the sureties on the collector's general bond were liable for the tax thus collected. The

[1] Roman v. Peters, 2 Robinson (La.) 479. Holding that an increase or diminution of the fees of an officer during his term does not change his office nor release the sureties on his official bond, see Sacramento Co. v. Bird, 31 Cal. 66.

[2] Municipality of Whitby v. Flint, 9 Up. Can. C. P. R. 449.

[3] Schuster v. Weissman, 63 Mo. 552. See, also, on this subject, Corporation of Ontario v. Paxton, 27 Up. Can. C. P. R. 104.

board of police had power to require a new bond, but were not obliged to do so, and the general bond covered the special levy, as it was for a county purpose.[1] At the time the sureties signed a county treasurer's official bond, there was a statute which provided that a certain fund should be divided between counties through which no railroad or canal ran, which fund should be used in the improvement of roads, constructing of bridges, and other public works, but it was not then known what counties would be entitled to the fund. Subsequently the county was declared to be entitled to a portion of the fund, and the county treasurer was appointed to receive, and did receive it. Held, the sureties on his official bond were not liable for his actings and doings as to said fund. It was a definite appropriation for a particular purpose, and in the nature of a special deposit. If it had been given to the county without any restriction as to its disposition, the sureties would have been liable.[2] Where a statute provided that a state treasurer should receive on special deposit money from those who desired to purchase public lands, and that such money should be kept separate from state funds till the sale was completed, and should then be transferred to the funds of the state, and if the sale was not completed that such money should be returned to the depositor, it was held that the sureties on the official bond of the treasurer were liable for the money so deposited.[3] The bond of a guardian was by statute required to be in double the amount of all the real and personal estate of the ward, and the general bond of a guardian provided for the payment by him of all money coming to his hands which belonged to the ward. The statute also provided, that when a guardian desired to lease lands of the ward, he should get a special order of the court for so doing, and should give another bond for the rents. A guardian

[1] State v. Hathorn, 36 Miss. 491. To a similar effect, see McGuire v. Bry, 3 Robinson (La.) 196. Holding that the sureties on the general bond of an officer are liable for duties imposed upon him by special statute before the sureties became liable, see State v. Bradshaw, 10 Iredell Law (Nor. Car.) 229. Holding that the sureties of the treasurer of a Poor Law Union, where the bond recites that he shall pay all "balances" due the Union, are liable for a balance, although it is not for money received by him, but is the result of a trading between him and the Union, see Belfield Union v. Pattison, 2 Hurl. & Gor. 623; Pattison v. Belfield Union, 1 Hurl. & Nor. 523.

[2] People v. Moon, 3 Scam. (Ill.) 123.

[3] State v. Rhoades, 7 Nevada, 434.

got a special order of the court for the leasing of the ward's land, and was ordered to give a bond for the rents, but failed to do so. Held, the sureties on the guardian's general bond were liable for the rents collected by him in pursuance of the order. The court said it was part of the duty of a guardian at common law to collect rent belonging to the ward. The extra bond required was cumulative, and would not release the sureties on the general bond, who by the terms of their bond were liable.[1] But where a statute provided that upon a sale by a guardian of real estate of the ward, he should give a special bond to account for the proceeds, it was held that the sureties on his general bond were not liable for such proceeds, although the terms of the bond were broad enough to cover such proceeds.[2]

§ 474. **Laches cannot be imputed to the state—Sureties of one officer not discharged by negligence of other officers.**—In general, laches cannot be imputed to the government, and where the laws require periodical accounts and settlements or an examination of the accounts of an officer at stated times, and the officers whose duty it is to enforce these provisions fail to do so, and they are not complied with by the principal, such neglect does not discharge the sureties on the principal's official bond. "It is said that the laws require that settlements should be made at short and stated periods, and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety."[3] This general principle is equally applicable to all corporations, public and private. All the officers of a government or corporation should observe its laws and regulations, and the sureties of one officer cannot set up as a defense when sued for the misconduct of their principal the fact that another set of officers have neglected or violated their duty. It should be borne in mind that all the officers of a government or corporation are its agents only, and cannot bind their principal by acts or defaults, which are not only unauthorized,

[1] Wann *v.* The People, 57 Ill. 202.

[2] Henderson *v.* Coover, 4 Nevada, 429.

[3] United States *v.* Kirkpatrick, 9 Wheaton, 720, per Story, J.; Mayor and City Council of Natchitoches *v.* Redmond, 28 La. An. 274; Mayor and Selectmen of Homer *v.* Merritt, 27 La. An. 568; Duncan *v.* The State, 7 La. An. 377.

but are expressly prohibited. The sureties of an officer of a government or corporation are not discharged by reason of the fact that his accounts are not examined by other officers thereof at the time prescribed by law;[1] nor by reason of the fact that such accounts are so negligently examined as not to discover existing defalcations:[2] nor by reason of the fact that money far exceeding the proper amount is negligently permitted to remain in the hands of the principal.[3] The sureties of a public officer are not discharged by the failure of the government to notify them of his default. The surety must in such case take notice of his principal's defaults.[4] The surety on a bond for the payment of duties, is not discharged by a mere delay in demanding payment after it becomes due, even though an act of congress required that suits for customs should be commenced without delay, and suit is not, in fact, commenced for ten years.[5] It has been held that the sureties of a township treasurer are not discharged by reason of the fact that the township council permits him to mix township money with his own.[6] So it has been held that the surety of a guardian is not discharged by the failure of the county court for five years to compel the principal to file an inventory and account.[7] The sureties of a sheriff are not discharged by the failure of the county court to appoint commissioners to investigate his accounts as required by law.[8] It has been held that it furnishes no defense to the sureties of a delinquent town collector, that if the warrant against their principal had been issued within the time prescribed by law, the amount due might have been collected from him.[9]

§ 475. **Surety of officer not discharged by violation of statutes enacted for the benefit of the Government.**—A statute pro-

[1] Amherst Bank *v.* Root, 2 Met. (Mass.) 522; Detroit *v.* Weber, 26 Mich. 284; City Council *v.* Paterson, 2 Bailey Law (So. Car.) 165; Collins *v.* Gwynne, 2 Moore & Scott, 640; Commonwealth *v.* Wolbert, 6 Binney (Pa.) 292; Inhabitants of Farmington *v.* Stanley, 60 Me. 472. *Contra*, The People *v.* Jansen, 7 Johns. 332.

[2] Board of Supervisors *v.* Otis, 62 New York, 88; County of Frontenac *v.* Breden, 17 Grant's Ch. R. 645.

[3] Creighton *v.* Rankin, 7 Clark & Finnelly, 325.

[4] The People *v.* Russell, 4 Wend. 570; Regina *v.* Pringle, 32 Up. Can. Q. B. R. 308.

[5] Hunt *v.* United States, 1 Gallison, 32. To similar effect, see Dox *v.* Postmaster General, 1 Peters, 318.

[6] Municipal Corporation of East Zora, *v.* Douglas, 17 Grant's Ch. R. 462.

[7] Commonwealth *v.* Preston, 5 T. B. Mon. (Ky.) 584.

[8] Bonta *v.* Mercer County Court, 7 Bush (Ky.) 576.

[9] Looney *v.* Hughes, 26 New York, 514.

vided that a distiller should, upon filing with the assessor notice of his intention to commence business, execute a bond with sureties to be approved by the assessor, and that no bond should be approved unless the distiller should be the owner of the unincumbered fee of the land on which the distillery was situated. The bond of a distiller was approved, the land being incumbered. Held, the sureties were not discharged by this fact. The object of the law was to protect the government, not benefit the sureties, and the sureties should have seen for themselves, that the land was unincumbered.[1] A county treasurer upon being re-appointed, gave a new official bond with sureties, without having first filed in the commissioner's office a certificate of his settlement, and the payment of his account with the state for the previous year, as the law required. Held, this was no defense to the sureties on the new bond.[2] A statute provided that if the paymaster of a regiment failed for six months to render his vouchers to the paymaster general, he should be recalled and another appointed in his place, and also provided that he should render monthly accounts. The paymaster did not render his accounts as the law required, and failed for more than six months to render accounts, but he was not removed, and afterwards received money. Held, the sureties on his official bond were liable for the money so received.[3] It has been held that statutes which required the special direction of the President of the United States to authorize the advance of public moneys to a disbursing officer, were merely directory, and were not a qualification of the contract of a surety of such officer, and that the surety was liable for the misapplication of public money by the principal, even though it was advanced to him contrary to the statute.[4]

§ 476. **Surety of an officer not discharged by unauthorized act of another officer.**—The sureties of one officer of a government or corporation are not affected by the unauthorized positive act of other officers of the government or corporation. Thus, the ordinances of a city expressly prohibited the city treasurer from using the public money for his own benefit. The mayor and council of the city allowed the treasurer to use the public money for his

[1] Osborne *v.* United States, 19 Wallace, 577.

[2] Clarke *v.* Potter County, 1 Pa. St. 159. To similar effect, see State *v.* Hayes, 7 La. An. 118.

[3] United States *v.* Vanzandt, 11 Wheaton, 184. See, also, United States *v.* Nicholl, 12 Wheaton, 505.

[4] United States *v.* Cutter, 2 Curtis, 617.

own purposes upon his agreement to pay interest therefor: Held, the sureties on the treasurer's official bond were not thereby discharged. The court said: "The funds are collected for public purposes. The mayor and council had no right and no power to use them for any other purpose. * An illegal contract could not enlarge the power of the city treasurer, neither could it limit his responsibility. That the illegal contract was made with the other agents of the city does not change the principle nor alter the duties and obligations of the treasurer. They remained the same and were defined by law. * The whole fallacy of the argument of the plaintiffs in error lies in confounding the mayor and council of the city with the city itself."[1] The same thing was held where the board of directors of a corporation, by an order not warranted by the by-laws thereof, authorized the treasurer of the corporation to loan its money when he should have deposited it in a bank.[2] Upon the same principle it has been held that the sureties of a tax collector are not discharged by the fact that the county commissioners falsely advertised that he had paid up all his liabilities for his preceding term, and the sureties became bound, relying on said advertisement.[3] A surety of a city treasurer, being sued on his bond, pleaded that the mayor of the city had released his co-surety. Held, no defense as the mayor had no authority to release the co-surety.[4] At the expiration of the second term of office of a county treasurer, the county board, without any authority so to do, allowed him $2,000 above his regular salary for selling tax certificates, etc., and settled with him on that basis. Held, the sureties on the treasurer's official bond were not discharged from the payment of the $2,000, as the action of the county board was absolutely void.[5] A county treasurer was liable for interest on public money, and also for certain money not paid over by him. The board of supervisors allowed him the interest as a perquisite of office, and forgave him the other money on account of his services in averting a draft. Held, the acts of the board were illegal, and the sureties on the treasurer's official bond were liable for the interest

[1] Manley *v.* City of Atchison, 9 Kansas, 358, per Kingman, C. J.

[2] Spring Hill Mining Co. *v.* Sharp, 3 Pugsley (New Bruns.) 603.

[3] Bower *v.* Com. of Wash. Co. 25 Pa. St. 69. To similar effect, see Detroit *v.* Weber 26 Mich. 284; State *v.* Bates 36 Vt. 387.

[4] Mayor *v.* Blache, 6 La. (Curry) 500.

[5] Supervisors of Kewannee Co. *v.* Knipfer, 37 Wis. 496; see, also, Wilson *v.* Glover, 3 Pa. St. 404.

and the other money, notwithstanding said acts of the board.[1] Upon the presentation of the account of a treasurer of a town, the selectmen examined it, and failing to detect an error in addition, certified the account to be correct, when, in fact, there was a deficit. The surety on the treasurer's official bond knew of this certificate soon after its entry on the treasurer's books. The treasurer was then solvent, but afterwards died insolvent, and the surety was afterwards sued for the above deficit. Held, he was liable therefor. The selectmen had no right, directly nor indirectly, to discharge the treasurer nor his surety from liability on their bond in case of a breach thereof.[2]

§ 477. **Surety of government officer liable for money stolen from or otherwise lost by him.**—The sureties on the official bond of a government officer are not discharged from liability for public money received by the officer, by reason of the fact that such money is stolen from him, or otherwise lost by him without his fault, even though he acted with reference to the matter in a careful and prudent manner.[3] This is held upon the ground that it is not a question of bailment, but of special contract, and public policy requires that the officer in such case shall be held to a strict accountability. Where the bond of a township treasurer provided that he should "well and truly fulfill the duties of treasurer * to the best of his ability, and according to law," and public money received by him was destroyed by accidental fire and without the fault of the treasurer, it was held that the sureties on his official bond were liable for such money.[4] The fact that a county treasurer has deposited the county money in a bank which afterwards fails, even though he was guilty of no negligence in making such deposit, does not discharge his surety from the payment of the money thus lost.[5] But it has been held that the con-

[1] Supervisors of Richmond Co. *v.* Wandel, 6 Lansing (N.Y.) 33.

[2] Inhabitants of Farmington *v.* Stanley, 60 Me. 472; Board of Supervisors of Jefferson Co. *v.* Jones, 19 Wis. 51. Holding that the sureties of a marshal are not discharged from the payment of costs collected by him for a clerk, by reason of the fact that the clerk permitted him to return the execution satisfied, see McNairy *v.* Marshall, 7 Humph. (Tenn.) 229.

[3] Boggs *v.* The State, 46 Texas, 10; Inhabitants of New Providence *v.* McEachron, 4 Vroom (N.J.) 339; Commonwealth *v.* Comly, 3 Pa. St. 372; McEachron *v.* Inhabitants of New Providence, 6 Vroom (N. J.) 528. *Contra*, by an evenly divided court, see Supervisors of Albany *v.* Dorr, 7 Hill (N. Y.) 583.

[4] District Township of Union *v.* Smith, 39 Iowa, 9.

[5] Supervisors of Omro *v.* Kaime, 39 Wis. 468.

dition of the bond of a treasurer of a railroad company that he should "faithfully discharge the duties of the office, and well and correctly behave therein," does not bind him to keep the money of the company safely against all hazards. It only binds him to an honest, diligent and competently skillful effort to keep the money. And if such treasurer deposits the company's money to his credit as treasurer in a banking house which is at the time in good credit and standing, and generally considered a safe place for the deposit of money, neither he nor his sureties are liable for a loss occasioned by the sudden and unexpected failure of the bank. The case was distinguished from that of a government officer, who was said to be held liable in such a case on grounds of public policy.[1]

§ 478. **Miscellaneous cases concerning sureties on official bonds.**—A collector of internal revenue may recover against his deputy and the sureties on his official bond, for money collected by the deputy and not paid over without first showing that he has paid to the government the amount so collected by the deputy.[2] The bond of a township treasurer provided that he should fulfill his duties "to the best of his ability": Held, these words did not lessen his liability, nor that of his sureties, and they were liable for township money accidentally destroyed by fire.[3] Where it is the statutory duty of a notary public to give notice of protest, the sureties on his official bond are liable for his failure to give such notice.[4] The sureties on the bond of a county auditor are liable for any overdrafts he may have made by issuing warrants payable to himself for salary, and receiving from the treasurer the amount thereof in excess of the compensation allowed him by the board of supervisors.[5] The omission of a collector of public revenue to remove a deputy collector after knowledge of a default by the latter, does not discharge the sureties of the deputy.[6] When one elected to the office of tax collector failed until after the time for him to enter upon his duties, to file his official bond which had been duly prepared and stated that he had been elected to the office, and the office was thereupon declared to be

[1] Atlantic & N.C. R. R. Co. v. Cowles, 69 Nor. Car. 59.

[2] Fuller v, Calkins, 22 Iowa, 301.

[3] District Township of Union v. Smith, 39 Iowa, 9.

[4] Wheeler v. The State, 9 Heiskell (Tenn.) 393.

[5] Mahaska County v. Ruan, 45 Iowa, 328.

[6] Pickering v. Day, 2 Delaware Ch. R. 333.

vacant, and he was subsequently appointed to the same office, whereupon the bond first prepared was filed, it was held that the sureties thereon were not liable for the default of the collector.[1] The liability of the sureties on the official bond of an officer for a failure on his part to pay over money collected by him under an execution, is not such a liability as will constitute them debtors of the plaintiff in such execution, so as to subject them to garnishment process as debtors of such plaintiff.[2] Where the misconduct of an officer consists in a neglect of official duty, such neglect, although a negative, must be proved by the party alleging it.[3] If an official bond is taken in the penal sum of $20,000, and is signed by ten sureties, who bind themselves, severally and not jointly, in the sum of $2,000 each, a judgment may be had against each surety for the full sum of $2,000, if an unsatisfied defalcation of the principal exceeds that sum, although such defalcation is less than $20,000; but the obligee can only have satisfaction to the amount of the defalcation.[4] The sureties on an official bond cannot recover from third persons money paid them by the principal, even though such money was trust funds in his hands as an officer.[5]

§ 479. **Liability of surety of bank clerk or cashier.**—The sureties of the cashier of a bank, when their bond provides for his good behavior, as such are not liable for money collected by him as an attorney for the bank, and not as cashier.[6] Money paid to the cashier of a bank, on the street, and also at a parent bank, to be deposited in the branch of which he is cashier, both payments being made to him as cashier, and as a deposit in the

[1] Winneshiek Co. *v.* Maynard, 44 Iowa, 15.

[2] Eddy *v.* Heath's Garnishees, 31 Mo. 141.

[3] Dobbs *v.* The Justices, 17 Ga. 624.

[4] Bank of Brighton *v.* Smith, 12 Allen, 243.

[5] Clore *v.* Bailey, 6 Bush. (Ky.) 77. Holding that the surety of a bank officer are not liable for any more damage than has actually been sustained by the owners of notes in the bank for collection, in consequence of a failure of the officer to have such notes protested at maturity, even though the bank has paid the amount of said notes to said owners, see Union Bank *v.* Thompson, 8 Robinson (La.) 227. Holding that an authority to fill a blank in an official bond, may be inferred from circumstances, see State *v.* Young, 23 Minn. 551. Holding it to be no defense to the surety on a guardian's bond, that another named in the bond as surety did not sign it, unless the obligee had express notice that there was an agreement that such other should sign, see State *v.* Lewis, 73 Nor. Car. 138.

[6] Dedham Bank *v.* Chickering, 4 Pick. 314.

bank of which he is cashier, is money received by him in his official capacity, and for which the sureties on his official bond are liable.[1] The same thing was held where a bank clerk was at the request of a customer of the bank, sent to his residence, about eleven miles from the bank, for the purpose of receiving a large sum of money to be placed to his account, and the clerk on his way back to the bank lost some of the money.[2] It has been held that it is not a forfeiture of a bond conditioned for the faithful service of a cashier, and for indemnifying against all loss by his malfeasance, misfeasance, willful neglect or wrongful act, that a loss has occurred by mere accident or mistake, or by his being unable to perform all the duties put upon him.[3] Where the condition of a bond was that A, who as a clerk in a bank, should "well and faithfully perform the duties assigned to and trust reposed in him, as first teller," etc., it was held to apply to the honesty, and not to the ability of the clerk, and that the sureties were not responsible for a loss happening to the bank from a mistake of the clerk.[4] But where the condition of a bank clerk's bond provided that he should perform all the duties incumbent on him by virtue of his office, and should pay the bank such damages or losses as it might incur by reason of the unfaithful performance of any of the duties of said office, it was held that the sureties therein were liable for any loss which the bank might sustain in consequence of any negligence of the principal, gross or slight, in the discharge of his official duties.[5] A cashier's bond is not void as against the policy of the law by reason of its being approved by a board of directors, some of whom had executed it as sureties.[6]

§ 480. **Liability of sureties of a justice of the peace.**—The duties of a justice of the peace are both of a judicial and ministerial character; judicial where he is required to act as a court, and pass upon and determine cases as they are tried before him; ministerial where he has to issue process, collect and pay over money, etc. His bond is usually conditioned that he will discharge every duty, both judicial and ministerial, faithfully and

[1] Pendleton *v.* Bank of Kentucky, 1 T. B. Mon. (Ky.) 171.

[2] Melville *v.* Doidge, 6 Man. Gr. & Scott, 450.

[3] Morris Canal & Banking Co. *v.* Van Vorst's Admx. 1 Zabriskie (N. J.) 100.

[4] Union Bank *v.* Clossey, 10 Johns. 271.

[5] Union Bank *v.* Thompson, 8 Robinson (La.) 227.

[6] Amherst Bank *v.* Root, 2 Met. (Mass.) 522.

impartially, without fear, favor, fraud or oppression. Where an officer acting in a judicial capacity errs in judgment, he is not liable, but where he acts through favor, fraud or partiality, or knowingly commits a wrong by virtue of his office, both he and the sureties on his official bond are liable therefor. Thus, where a justice through favor, and with the intent to defraud a party, heard a case three hours before it was set for hearing, it was held that he and the sureties on his official bond were liable therefor to the party injured.[1] The sureties on the official bond of a justice are liable if he issues an execution in a case over the subject matter of which he has jurisdiction, but in the issuing of which he infringes the law and abuses his authority.[2] The issuing by a justice of an order of arrest in a civil action, without an undertaking being previously executed as required by statute, is a neglect to well and truly perform a ministerial act which constitutes a breach of the official bond of the justice and renders his sureties liable. "A justice of the peace acts in both a judicial and ministerial capacity. The manner of discharging his judicial duties is left to his own judgment, but in general the acts which he is required to perform in a particular way, and as to which he has no discretion about the manner of their performance, are of a ministerial character. In regard to issuing an order of arrest, everything to be done is specifically defined by the statute. Nothing is left to the discretion of the justice; he must proceed in a specified manner. He acts in the same capacity that he does in issuing an execution after judgment."[3] Where a justice, without any authority so to do, ordered a constable to be committed to jail for contempt of court, it was held that the sureties on his official bond were not liable for such act.[4] Where the official bond of a probate judge was conditioned for the "faithful performance of his official duties," it was held that his failure to make a proper order on the final report of an administrator, and making an improper order thereon, were a breach of his bond.[5] The sureties on the official bond of a justice are not liable for his failure to collect a note placed in his hands, when by the use of due diligence he might

[1] Gowing v. Cowgill, 12 Iowa, 495. See, also, on this subject, State v. Littlefield, 4 Blackf. (Ind.) 129; Howe v. Mason, 12 Iowa, 202.

[2] Fox v. Meacham, 6 Nebraska, 530.

[3] Place v. Taylor, 22 Ohio St. 317, per Day, J.

[4] Doepfner v. The State, 36 Ind. 111.

[5] Smith v. Lovell, 2 Montana, 332

have collected the same.[1] Where a statute provided that the bond of a justice should remain in force for five years after the office of the justice expired, it was held that no action could be maintained on the bond after the expiration of that time, and that the statute was not a statute of limitations which need be specially pleaded.[2]

§ 481. **When sureties on official bond of justice liable for money received by him.**—The sureties on the official bond of a justice are liable to the owner of a judgment rendered by such justice, and entered on his docket, for money paid to and collected by such justice in satisfaction of such judgment, even though no execution has been issued thereon. "The money was paid to the justice because he was a justice of the peace, and because he had power by virtue of process issued from his court to enforce the collection of the same. It came into his hands by virtue of his office, and the sureties as well as himself, are liable for it."[3] So the sureties on the official bond of a justice are liable for money collected by him in his official capacity, though it is collected without suit or process.[4] Where a county judge has authority to receive, and does receive, money paid by an executor upon claims filed and allowed against an estate, the sureties on his official bond are liable for his failure to pay the same over to the parties entitled thereto.[5] Certain notes were placed in the hands of a justice for collection, and he received and receipted for them as justice. Afterwards he went out of office, and did not deliver the notes to his successor, as it was his duty to do, and refused to surrender them to the owner on demand. Held, he and the sureties on his official bond were liable for his act in thus refusing.[6] Proceedings were commenced before a justice, the extent of whose jurisdiction was $100, to recover a debt less than $100, and the defendant confessed judgment for a sum exceeding $100, which was paid to the justice without any execution being issued. Held, the sureties on the official bond of the justice were liable for the money thus collected by him.[7] Where a jus-

[1] McGrew v. The Governor, 19 Ala. 89.

[2] The People v. Herr, 81 Ill. 125.

[3] Brockett v. Martin, 11 Kansas, 378, per Valentine, J.

[4] Ditmars v. The Commonwealth, 47 Pa. St. 335; Widener v. The State, 45 Ind. 244; Commonwealth v. Kendig, 2 Pa. St. 448.

[5] Wright v. Harris, 31 Iowa, 272.

[6] Latham v. Brown, 16 Iowa, 118; Bessinger v. Dickerson, 20 Iowa, 260.

[7] Hale v. Commonwealth, 8 Pa. St. 415.

tice was not authorized to receive money as security for the appearance of a prisoner before him for examination on a criminal charge, but did receive it and refused to return it to the party entitled thereto, it was held that the sureties on his official bond were not liable therefor.[1]

§ 482. **How surety on official bond of justice affected by his death.**—The sureties on the official bond of a justice of the peace, conditioned that he shall well and truly pay over, according to law, all money that may come to his hands by virtue of his office, are liable upon failure of the personal representatives of the justice after his death to pay over upon demand money that came into his hands officially during his term of office.[2] A justice having failed to file certain appeal papers, as his duty required, suit was brought on his official bond against him and his sureties to recover damages therefor. After the service of the process in the case, the justice died. His death was pleaded in abatement of the suit by his sureties, and it was claimed that, as the action was founded on a tort by the justice, his sureties were not liable. Held, the sureties were liable. The neglect of the justice was a breach of the bond, and the action being on a contract, did not die with the justice, although a tort had to be proved to establish a breech.[3]

§ 483. **Surety of sheriff or constable liable only for his acts within the scope of his authority or duty.**—As a general rule, the sureties of a sheriff or constable are only liable for such of his acts or defaults as are within the scope of his authority or duty as such officer.[4] Thus, where the defendant in a writ in the hands of a sheriff, instead of giving bail, deposited money with the sheriff, and afterwards wished to surrender himself, and demanded the money from the sheriff which he refused to return, it was held that the sheriff had no right to receive the money by virtue of his office, and the sureties on his official bond were not liable therefor.[5] The sureties on a sheriff's official bond are not liable for money paid to him by a judgment debtor after the return-day

[1] Cressy v. Gierman, 7 Minn. 398.

[2] Peabody v. Ohio, 4 Ohio St. 387.

[3] House v. Fort, 4 Blackf. (Ind.) 293.

[4] City of St. Louis v. Sickles, 52 Mo. 122.

[5] State v. Long, 8 Iredell Law (Nor. Car.) 415. To the same effect, where a sheriff agreed with a plaintiff in replevin that he would sell the property in litigation in the replevin suit and keep the proceeds to answer the judgment in that suit, see Schloss v. White, 16 Cal. 65

of the execution held by the sheriff, for he has then no authority to receive such money.[1] A judgment was rendered by a justice and the defendant therein sold a constable some property, and the constable agreed to pay the judgment, to which the creditor consented. No execution was issued on the judgment, and the constable did not pay it. Held, the sureties on his official bond were not liable for his default in that regard.[2] The sureties on a constable's official bond are not liable for a note collected by him without legal process, although he gave a receipt for the note as constable.[3] An attachment was levied by a sheriff on property sufficient to satisfy the same, but the sheriff falsely represented to the plaintiff that no property could be found, and thereby induced the plaintiff to sell him the claim in suit for one-fourteenth of its face value. Held, the sureties on the sheriff's official bond were not liable for his acts in that regard. The court said such sureties were not liable for the malfeasance of the sheriff unless his acts also amounted to misfeasance.[4] A statute provided that land sold on execution might be redeemed within a certain time, by paying to the clerk of the court the amount with interest. A party wishing to redeem land, placed the money in the hands of the sheriff. Held, the sureties on his official bond were not liable for such money.[5] A constable's official bond provided that he should pay over all the sums received by him "upon any note, account, or other claim placed in his hands for collection." A statute also provided that constables should be liable for claims left with them for collection. A claim greater in amount than the jurisdiction of any of the inferior courts, was placed in a constable's hands for collection, and collected by him. Held, the sureties on his bond were not liable for the sum thus collected by him, as it was not an official act.[6] But where a sheriff held an execution against a defendant, and demanded $250 more than was due on the same, and threatened to levy if it was not paid, and the defendant not knowing the true amount, paid the amount demanded, it was held that the defendant was entitled to

[1] Thomas v. Browder, 33 Texas, 783; Forward v. Marsh, 18 Ala. 645; see, also, with reference to this subject, McGehee v. Gewin, 25 Ala. 176.

[2] Hill v. Kemble, 9 Cal. 71.

[3] United States v. Cranston, 3 Cranch, 289.

[4] The Governor v. Hancock, 2 Ala. 728.

[5] Sample v. Davis, 4 Greene (Iowa) 117.

[6] Commonwealth v. Sommers, 3 Bush (Ky.) 555.

recover the $250 back from the sheriff, and the sureties on his official bond.[1]

§ 484. **Liability of surety of sheriff or constable for his act in seizing property.**—The sureties of a sheriff or constable are liable for his acts in seizing property which are done *virtute officii*, but whether or not they are liable for his acts done *colore officii*, is a matter concerning which there is great conflict of authority. The difference between such acts has been thus stated: "Acts done *vitute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them."[2] Where a sheriff, having an execution against the goods and chattels of one person, levied on and sold the goods of another, it was held that the act was not done by virtue of, but by color of the sheriff's office, and the sureties on the sheriff's official bond were not liable therefor. The court said the sheriff was simply a trespasser, the same as if he had had no writ. The taking of the goods was not an official act. "Official acts are those which are done by virtue of the office, such as, if properly done, exculpate both the officer and his sureties from responsibility, but which, if neglected or improperly done, render both liable. If the authority is exceeded or the duty omitted, an action may be maintained against the officer in his official capacity, and his sureties held responsible for it. Unofficial acts are such as are committed under color of the office, such as cannot be lawfully done, and cannot be justified by the official character of the sheriff, or by any process in his hands."[3] On the other hand it has been held that the sureties on the official bond of the sheriff are, under the above circumstances, liable for his acts. In such a case, it was said that "The sheriff received the process in virtue of his office. His sureties undertook that he should well and truly execute the process. This he failed to do, to the injury of the plaintiff." The case was different from what it would have been, if he had had no writ. "In that case * he would act in his own right, and might be resisted as any

[1] Snell *v.* The State, 43 Ind. 359.

[2] Per Cole, J. in Gerber *v.* Ackley, 37 Wis. 43.

[3] State *v.* Conover, 4 Dutcher (N. J.) 224, per Haines, J. *Contra*, with reference to an attachment, People *v.* Schuyler, 4 New York, 173, overruling People *v.* Schuyler, 5 Barb. (N.Y.) 166.

wrong doer. In the present he was put in motion by legal authority invoked in behalf of others, and could compel the power of the county to aid him in its execution. His official character would forbid opposition."[1] Where a sheriff wrongfully seizes property without color of process, the sureties on his official bond are not liable for his acts in that regard.[2] A constable had in his hands an execution against principal and surety, which it was by law his duty to levy, first on the property of the principal, and he levied on sufficient property of the principal to satisfy the same, but allowed the property to be wasted, and then levied on property of the surety. In a suit by such surety against the sureties on the constable's official bond, it was held that the levy on the property of the principal was a satisfaction of the judgment, and the constable had no right to levy on the property of the surety, but as he did so by color of his office, the sureties on his official bond were liable therefor.[3] Where a constable took goods on a writ directed to him, but which he had no authority to serve, by reason of the damages laid in the writ being so great, it was held to be an act done under color of his office, for which the sureties on his official bond were liable.[4] It has been held that the sureties on a constable's official bond are liable for his acts in seizing on execution property which is exempt therefrom.[5] A sheriff, knowing that certain goods had been manufactured in the state, and that no license fee was required for them, seized the goods, as he would have been authorized to do if they had been manufactured out of the state, but which he had no authority to do as the facts were. Held, the sureties on his official bond were not liable for his acts in making such seizure.[6]

§ 485. **Measure of damages for breach of duty of sheriff with reference to process, etc.**—As a general rule, the debt due the plaintiff is *prima facie* evidence of the extent of the injury which he has sustained by a sheriff's breach of duty in regard to

[1] Holliman v. Carroll, 27 Texas, 23, per Wheeler, C. J. To the same effect, with reference to an attachment, see Charles v. Haskins, 11 Iowa, 329.

[2] State v. Mann, 21 Wis. 684. To the same effect, with reference to the sureties of a village marshal, who had the powers of a constable, see Gerber v. Ackley, 32 Wis. 233.

[3] The State v. Druly, 3 Ind. 431.

[4] City of Lowell v. Parker, 10 Met. (Mass.) 309.

[5] State v. Farmer, 21 Mo. 160; Strunk v. Ocheltree, 11 Iowa, 158.

[6] State v. Brown, 11 Ired. Law (Nor. Car.) 141.

the service and return of process, but it may usually be shown, in mitigation of damages, that the plaintiff has been injured but little, or not at all, and the actual injury is in such case usually the measure of damages.[1] A sheriff arrested the defendant in a civil suit, who gave bail. The bail was excepted to but did not justify, and in consequence thereof the sheriff, by reason of a statutory provision, became liable as bail. Held, the sureties on his official bond were liable for the amount the debtor owed, and it made no difference that the debtor had all the time been insolvent. The court said the sheriff was liable as bail, and that bail are liable for the full amount of the debt if they fail to produce the principal, even though the principal has all along been insolvent.[2] Where an act of the legislature made the sheriff liable for the amount of tax executions if he failed to return them within the time limited by law, it was held that he and the sureties on his official bond were liable for the full amount of tax executions not returned, even though the defendants therein were insolvent.[3] It has been held that when an execution is placed in the hands of a sheriff, the presumption of law, in the absence of evidence, is that he levied it before the return day and made the money, because it was his duty to do so, and the law would presume he did his duty.[4]

§ 486. **Liability of surety on sheriff's official bond to surety for debt who is injured by sheriff's acts.**—It has been held, that if sureties for a debt are compelled to pay it by reason of the neglect of the sheriff to collect it from the principal, they will have a right of action against the sheriff and the sureties on his official bond for the damage thus suffered.[5] A deputy sheriff seized and sold under a junior execution property of the principal, which

[1] Taylor *v.* Johnson, 17 Ga. 521; overruling Crawford *v.* Word, 7 Ga. 445; see, also, Dobbs *v.* The Justices, 17 Ga. 624; Treasurers *v.* Hilliard, 8 Richardson Law (So. Car.) 412; Carpenter *v.* Doody, 1 Hilton (N.Y.) 465; To the same effect, where a sheriff and the sureties on his official bond are sued for an escape on mesne process, see Crawford *v.* Andrews, 6 Ga. 244. But it seems that, for an escape on final process, the sheriff and the sureties on his official bond are liable to the full amount of the debt, even though the defendant is insolvent; Taylor *v.* Johnson, 17 Ga. 521.

[2] People *v.* Dikeman, 3 Abb. Rep. Om. Cas. 520.

[3] Treasurers *v.* Hilliard, 8 Richardson Law (So. Car.) 412.

[4] O'Bannon *v.* Saunders, 24 Gratt. (Va.) 138.

[5] Bank of Pennsylvania *v.* Potius, 10 Watts (Pa.) 148; *contra*, State *v.* Reynolds, 3 Mo. 70.

should have been sold under a prior execution, in which a surety was also bound. The surety sued the sheriff and the sureties on his official bond for resulting injuries, and it was held he was entitled to recover such damages as he had suffered thereby.[1]

§ 487. **Miscellaneous cases as to liability of sureties on official bonds of sheriff or constable.**—The sureties on a sheriff's official bond, are liable for the acts of his deputy, even though there is no provision in the bond to that effect, for the act of the deputy is the act of the sheriff.[2] Where a deputy sheriff collects money on execution, and neglects or refuses to pay the same over, the remedy of the party injured is by action against the sheriff and the sureties on his official bond, and not against the deputy and his sureties.[3] It has been held that the return of a sheriff that he has levied a certain amount on an execution, is an official act, which renders his sureties liable for the amount so returned, although the sureties offer to prove that the amount was not levied.[4] A statute provided that judgments on bonds payable to the state, should bind the real estate from the commencement of the action. Held, the surety on a sheriff's official bond was a debtor within the meaning of the statute.[5] The sureties on a sheriff's official bond, are not entitled to notice of the default of their principal, in order to render them liable for such default.[6] Where, with a full opportunity of obtaining knowledge on the subject, the surety on a constable's official bond voluntarily paid money which the constable had collected, it was held he could not recover the same back, even though he was not actually liable on the bond.[7] Where a constable collected money on execution, and the plaintiff in execution permitted him to use it upon his agreement to pay interest, it was held that the sureties on his official bond, were not thereafter liable for the money so collected.[8] But it has been held that the sureties on a constable's official bond are

[1] Stanton *v.* The Commonwealth, 2 Dana (Ky.) 397. Holding that a sheriff who neglects to make a debt out of the principal when he can do so, is liable to the surety for such neglect, see Hill *v.* Sewell, 27 Ark. 15.

[2] Crawford *v.* Howard, 9 Ga. 314.

[3] Brayton *v.* Towns, 12 Iowa, 346.

[4] Commissioners *v.* Mayrant, 2 Brevard (So. Car.) 228.

[5] Shane *v.* Francis, 30 Ind. 92.

[6] Dougherty *v.* Peters, 2 Robinson (La.) 534. To the same effect, with reference to the sureties of a deputy sheriff, McGehee *v.* Gewin, 25 Ala. 176.

[7] Ferguson *v.* Hirsch, 54 Ind. 337.

[8] Hill *v.* Kemble, 9 Cal. 71.

not discharged from liability for money collected by him, by reason of the fact that the creditor, without consideration, consented to a delay in payment on the part of the constable.[1] The fact that a constable is prevented by sickness from levying an execution which it is his duty to levy, is no excuse either for him or the sureties on his official bond.[2] A judgment was rendered against A, and an execution was put into the hands of the sheriff, who collected the money from A. The judgment was afterwards reversed, but before such reversal the sheriff died without paying the money over. After the judgment was reversed, A sued the sureties on the sheriff's official bond for the money collected by the sheriff. Held, they were not liable. The sheriff collected the money legally, and up to the time of his death, was guilty of no default.[3]

§ 488. **Action against sureties on sheriff's official bond.**— Where a sheriff's official bond is joint and several, suit thereon may first be brought against one of the sureties alone, without joining the sheriff as a defendant in such suit.[4] Where there has been a breach of the condition of a sheriff's official bond, the sureties are liable thereon in the first instance, without the sheriff being previously fixed by suit against him alone.[5] A recovery against a sheriff alone, without satisfaction, for a matter which constitutes a breach of his official bond, is not a bar to a subse-

[1] Boice v. Main, 4 Denio, 55.

[2] Freudenstein v. McNier, 81 Ill. 208.

[3] State v. Vananda, 7 Blackf. (Ind.) 214. Holding the sureties of a sheriff who has died, liable for acts of an under sheriff done subsequent to the death of the sheriff, see Newman v. Beckwith, 5 Lansing (N.Y.) 80. Holding that the official bond of a sheriff who still acts, covers his acts done after his office might have been declared vacant, see Vann v. Pipkin, 77 Nor. Car. 408. Holding the sureties on a constable's bond liable for his failure to return an execution, see Carpenter v. Doody, 1 Hilton (N.Y.) 465. Holding that one surety on a constable's official bond cannot, as relator, sue the other sureties on the bond, see Sanders v. Bean, Busbee's Law (Nor. Car.) 318. Holding that the sureties of a sheriff are not liable for the proceeds of real estate, when the sheriff, according to the provisions of a statute, acts as an administrator, see Heeter v. Jewell, 6 Bush (Ky.) 510. Holding that, in determining the liability of a constable and the sureties on his official bond, the statute in force at the time must be regarded as part of the contract between them and the public, see Freudenstein v. McNier, 81 Ill. 208. To the effect that the sureties on a constable's official bond are liable thereon, although the bond is not accepted as required by law, see Heath v. Shrempp, 22 La. An. 167.

[4] Governor v. Perkins, 2 Bibb (Ky.) 395.

[5] Smith v. Commonwealth, 59 Pa. St. 320.

quent suit against him and his sureties on the bond.[1] The sureties of a sheriff, after recoveries have been had against them to the amount of their bond, may defend themselves at law on that ground against all pending and future suits, and therefore cannot come into equity to enjoin such suits.[2]

§ 489. **Liability of surety on deputy sheriff's official bond.**—It is no defense to the sureties on the official bond of a deputy sheriff, that before the alleged default of the deputy he had become insolvent, in consequence of which the sureties requested the sheriff to remove him from his office, which the sheriff failed to do.[3] If a sheriff pays to a plaintiff the amount of an execution then in force in the hands of his deputy, and the deputy afterwards collects it from the defendant in execution, the sureties on the deputy's official bond are liable if he fails to account for it.[4] The sureties on a deputy sheriff's official bond may plead anything which their principal could plead in denial of his liability on the bond.[5] The sureties on the official bond of a deputy sheriff are liable for taxes collected by him in his official capacity, when the sheriff is by law collector of taxes.[6]

§ 490. **Whether joint guardians or administrators are sureties for each other, etc.**—Where there are several guardians of an infant's estate, who have given a joint and several bond with sureties for their good behavior, the guardians may act either separately or in conjunction. They are jointly responsible for joint acts, and each is separately answerable for his separate acts and defaults. Such guardians are not by reason of having given the bond aforesaid, nor for any cause, sureties of each other, but the sureties on their bond are liable for their joint defaults, and for the default of each.[7] But it has been held, that where two persons, administrators of the same estate, join in executing a bond with others as their sureties, each of such administrators will be held as surety for the other.[8] Two guardians were appointed

[1] Treasurers *v.* Sureties of Oswald, 2 Bailey Law (So. Car.) 214; Charles *v.* Haskins, 11 Iowa, 329.

[2] Bothwell *v.* Sheffield, 8 Ga. 569. Holding that the sureties on a sheriff's official bond are not entitled to notice on a summary application under a statute for judgment against such sheriff and sureties, see Reid *v.* Jackson, 1 Ala. 207.

[3] Andrus *v.* Bealls, 9 Cowen, 693. Barnard *v.* Darling. 11 Wendell, 28.

[4] McGehee *v.* Gewin, 25 Ala. 176.

[5] Wallace *v.* Holly, 13 Ga. 389.

[6] Wood *v.* Cook, 31 Ill. 271.

[7] Kirby *v.* Turner, Hopkins Ch. R. (N.Y.) 309.

[8] Moore *v.* The State, 49 Ind. 558.

by a court of chancery, and gave bond with surety that they would faithfully execute the trusts respectively reposed in them, according to the terms of the orders appointing them. One of them died, and it was held that the trusts survived, and that the surety was responsible for the subsequent acts of the surviving guardian.[1]

§ 491. **Action against surety on guardian's bond.**—A suit against the sureties on a guardian's bond is not, it seems, sustainable without a previous liquidation of the amount due from the guardian.[2] A ward may sustain a suit in equity for an account against his guardian and the sureties on the guardian's official bond. Equity has always entertained jurisdiction between guardian and ward for an account, and "jurisdiction as to the guardian will draw with it the surety."[3] It has been held that if the final decree in such a case is for the payment of money, the decree should be so framed as to be enforced against the sureties in the event only that the money cannot be made out of the principal.[4]

§ 492. **Discharge of surety of guardian by order of court, etc.**—Important questions frequently arise with reference to the discharge of sureties on a guardian's bond by the action of a court, proceeding under statutory authority. Thus, a statute provided that by certain proceedings the court of ordinary might discharge a guardian's bond, and cause new sureties to be substituted. This was done, and it was held that such discharge only released the sureties on the first bond from liability for defaults of their principal occurring subsequent to such discharge. The court said that the legislature could not authorize any further discharge, for to do so would be to impair contracts and destroy vested rights.[5] It has been held that the discharge of one of several sureties of a guardian under such a proceeding, being an act of law, does not discharge the other sureties on the same bond.[6] A statute authorized the county court to discharge the sureties on guardians' bonds under certain circumstances, and to take other good and sufficient sureties. The county court on proper proceedings,

[1] The People v. Byron, 3 Johns. Cas.

[2] Stilwell v. Mills, 10 Johns. 304; Salisbury v. Van Hoesen, 3 Hill (N.Y.) 77; Bowman v. Ex'rs of Herr, 1 Pen. & Watts (Pa.) 282; Sebastian v. Bryan, 21 Ark. 447; Critchett v. Hall, 56 New Hamp. 324. Sustaining same view, see Hunt v. White, 1 Ind. (Carter), 105; Bailey v. Rogers, 1 Greenl. (Me.) 186. See, also, Wann v. People, 57 Ill. 202 *Contra*, State v. Humphreys, 7 Ohio, 224.

[3] Hutchcraft v. Shrout, 1 T. B. Mon. (Ky.) 206.

[4] Hendry v. Clardy, 8 Fla. 77.

[5] Justices v. Woods, 1 Kelly (Ga.) 84.

[6] Boyd v. Gault, 3 Bush (Ky.) 644.

ordered certain sureties of a guardian to be released, and took a new bond with bad sureties. Held, the fact that the sureties in the last bond were bad did not invalidate the discharge of the first sureties.[1] The court of common pleas ordered a guardian to pay the money of his ward to the clerk of the county court upon his resigning his guardianship. The statute did not make it one of the duties of the county clerk to receive money thus paid. The clerk converted the money to his own use, and it was held that the guardian and his sureties were liable to the ward for the money, notwithstanding such payment to the clerk.[2]

§ 493. **Liability of surety of guardian—Miscellaneous cases.** —Where money was paid to a guardian, as such, to which his wards were not entitled, the same being paid by mistake, it was held that the sureties of the guardian were not liable to any one on account of such money.[3] A mother died intestate, leaving personal property, and no letters of administration were taken out on her estate. The guardian of her children took possession of her property and realized from it a certain sum. Held, the sureties on the guardian's bond were liable for the proper application of such sum.[4] It has been held that the estate of a surety on a guardian's bond is liable for a default of the guardian which occurred subsequent to the death of the surety.[5] A, the beneficiary in a guardian's bond, gave an order to B on the guardian C, which was accepted but not paid by C. Held, this did not discharge the sureties of the guardian from liability for the amount.[6] The liability of the surety in a guardian's bond is not limited to property owned by the ward at the time the bond is executed, but (the terms of the bond being sufficiently general for that purpose) extends to property subsequently acquired by the ward, which comes to the guardian's hands.[7] A guardian was appointed by a court not having jurisdiction in the special case (because the ward did not reside in that county), and in good faith received money belonging to the ward and afterwards settled his account in the proper court. Held, he and the sure-

[1] Crawford *v.* Penn, 1 Swan (Tenn.) 388. To similar effect, see Hamner *v.* Mason, 24 Ala. 480. See, also, on this subject, McGehee *v.* Scott, 15 Ga. 74.

[2] The State *v.* Fleming, 46 Ind. 206.

[3] Ballard *v.* Brummitt, 4 Strobh. Eq. (So. Car.) 171.

[4] Warwick *v.* The State, 5 Ind. 350.

[5] Voris *v.* The State, 47 Ind. 345.

[6] Bond *v.* Ray, 5 Humph. (Tenn.) 492.

[7] Gray *v.* Brown, 1 Richardson Law (So. Car.) 351.

ties on his bond were estopped to deny his liability for the money so received and accounted for.[1]

§ 494. **When surety of executor or administrator not liable till devastavit established by suit against principal.**—Although there is a conflict among the cases, the weight of authority seems to be that in the absence of a statute on the subject, the sureties on the official bond of an executor or administrator are not liable to suit thereon until a judgment has been recovered against the executor or administrator in his official capacity, and also another judgment against him personally, establishing a devastavit. The reason given for these decisions is, that the liabilityof such sureties is contingent and not direct, and it would be unjust to allow them to be called upon until it is established that their principal has been guilty of wrong doing in his office.[2] It has been held that the settlement of a general account by an executor, disclosing a general balance in his hands, does not fix the executor so as to enable a distributee to maintain an action on the executor's official bond. Such balance may be required to liquidate other claims.[3] So it has been held that a judgment confessed by an administrator, upon which no execution has been issued, is not sufficient to charge the sureties on his official bond. If an execution had been issued, property to satisfy the same might have been found.[4] It has also been held that a decree in chancery against an executor or administrator, directing him to pay a debt of his testator or intestate, out of the assets of the estate in his hands, where *fieri facias* has been issued on such decree, and returned *nulla bona*, is not sufficient evidence of a devastavit to authorize an action against the sureties on the official bond of the executor or administrator.[5] On the other hand, it has been held, that after a judgment has

[1] McClure v. Commonwealth, 80 Pa. St. 167. To the effect that a surety, who becomes bound for a guardian in one county, is not bound after the guardian leaves such county, and has the guardianship transferred to another county, see Justices v. Selman, 6 Ga. 432. Holding the liability of a surety on a guardian's bond before a breach of the condition of the bond, a contingent liability, which is discharged by the discharge of the surety in bankruptcy, see Reitz v. The People, 72 Ill. 435.

[2] Justices v. Sloan, 7 Ga. 31; Myers v. Fretz, 4 Pa. St. 344; Cameron v. The Justices, 1 Kelly (Ga.) 36; Catlett v. Carter's Exrs. 2 Munf. (Va.) 24. See, also, Treasurer of Pickaway v. Hall, 3 Ohio, 225. Eaton v. Benefield, 2 Blackf. (Ind.) 52.

[3] Commonwealth v. Stub, 11 Pa. St. 150.

[4] Lining v. Giles' Ex'rs., 3 Brevard (So. Car.) 530.

[5] Hairston v. Hughes, 3 Munf. (Va.) 568.

been obtained against an executor or administrator in his representative capacity, and execution thereon has been returned unsatisfied, he and the sureties on his official bond may be sued at once, without a separate suit being first prosecuted against him alone, and that all will be liable if a devastavit on his part is proved by any evidence satisfactorily showing the fact.[1]

§ 495. **Cases holding surety of executor or administrator liable without devastavit being first established by suit against principal.**—Where an executor dies without any personal representative, it has been held that a court of equity may, at the suit of a legatee, and without any previous suit having been brought against the executor to convict him of a devastavit, convene the sureties on the executor's official bond, or their legal representatives, and the persons who are interested in any estate which the executor may have left, and make the sureties liable for any misapplication or wasting of the assets which may be established in the suit. It was contended that, as the executor was dead, and no devastavit could be established by suit at law against him, the sureties were discharged. But the court said that the circumstances of the case took it out of the general rule. The right existed, and there should not be a failure of a remedy for want of a particular kind of evidence. All that was necessary under the circumstances was that the devastavit be established by satisfactory evidence showing the fact.[2] So it has been held that whenever an executor or administrator absconds, conceals himself, or resides beyond the jurisdiction of the court, an action will lie on his official bond against the surety thereon, without recourse in the first instance being had against the principal. If it were otherwise, by collusion with the principal the sureties might prevent ever being sued.[3] An administrator settled with the county court, and on his report, was ordered to pay certain amounts to the heirs, which he failed to do. The administrator died, and as a consequence, no demand for such amounts was made by the heirs. A statute required that a demand should be made before an administrator should be chargeable with a devastavit. Held,

[1] Hobbs *v.* Middelton, 1 J. J. Marsh (Ky.) 176; Clarkson *v.* Commonwealth, 2 J. J. Marsh (Ky.) 19; Thomson *v.* Searcy, 6 Port. (Ala.) 393. See, also, on this subject, Treasurer of Franklin Co. *v.* McElvain, 5 Ohio, 200.

[2] Spottswood *v.* Dandridge, 4 Munf. (Va.) 289.

[3] Commonwealth *v.* Wenrick, 8 Watts (Pa.) 159.

in a suit on the administrator's official bond against the sureties therein, that the administrator having died, no demand on him was possible, and the sureties were liable without any such demand.[1]

§ 496. **When surety of executor or administrator concluded by settlement by or judgment against principal.**—The sureties on the official bond of an executor or administrator are, as a general rule, conclusively bound by a final settlement made by their principal with the probate court, and by a decree of such court, finding assets in his hands, because the effect of the terms of their bond is that they shall be so bound.[2] A party having been named as executor of a will, gave bond as such, and entered upon the discharge of his duties, but died without settling his accounts as executor. An administrator of the executor was appointed, who settled the executor's account with the orphans' court, and there was thereupon a decree by such court that the administrator should pay a legacy to be levied out of property of the executor. Held, the sureties of the executor were not concluded by the settlement made by the administrator with the court, because it was as to them *res inter alias acta.* The court, however, said it would have been otherwise if the settlement had been made by the executor.[3] It has been held that a settlement made by an administrator with the probate court, in which it was found that the estate was indebted to the administrator (such settlement not being the final settlement), was not a final and conclusive judgment which released the sureties on the administrator's official bond.[4] It has been held, that the sureties on an administrator's bond may show that before the commencement of an action in which judgment was rendered against their principal, his authority as administrator had become extinguished, and that such proof will relieve the sureties from liability on account of such judgment.[5] It has been held, that the sureties on the official bond of an administrator are not liable to a creditor of the estate for the amount of a judgment obtained by such credi-

[1] The People *v.* Admire, 39 Ill. 251.

[2] Stovall *v.* Banks, 10 Wallace, 583. For applications of this principle to various cases, see Lucas *v.* Curry's Exrs. 2 Bailey Law (So. Car.) 403; Hobbs *v.* Middleton, 1 J. J. Marsh (Ky.) 176; Boyd *v.* Caldwell, 4 Richardson Law (So. Car.) 117; Taylor *v.* Hunt's Exr. 34 Mo. 205; Ordinary *v.* Kershaw, 1 McCarter (N. J.) 527; Casoni *v.* Jerome, 58 New York, 315; *contra*, Hayes *v.* Seaver, 7 Greenl. (Me.) 237. Holding such decree only *prima facie* evidence against the surety, see Lipscomb *v.* Postell, 38 Miss. 476.

[3] Gray *v.* Jenkins, 24 Ala. 516.

[4] Musick *v.* Beebe, 17 Kansas, 47.

[5] Bourne *v.* Todd, 63 Me. 427.

tor in an action against the administrator, commenced after the claim was barred by the statute of limitations, and in which action the administrator appeared and pleaded the statute, but was afterwards defaulted. Of this statutory bar the court said: "Its effect is, therefore, controlling and decisive, and to this extent the sureties may object to the effect of a judgment against their principal when sued on their bond to the judge of probate."[1]

§ 497. **Liability of surety on first and second bonds of executor or administrator.**—Where an administrator has money of the intestate in his hands at the time of the execution of a second bond, and afterwards converts it to his own use, the sureties on such second bond are liable for the money so converted, the same as if it had been collected after the execution of the second bond.[2] Where the condition of an administrator's bond was that he should pay over whatever money should be coming to the lawful heirs of the estate, and an item of cash received by the administrator before the execution of the bond appeared on the inventory of the estate at the time the bond was given, it was held that the surety on the bond was liable for such cash the same as for cash received after the bond was executed.[3] Where the sureties on the first bond of an administrator were upon petition properly released, it was held that the effect of the release was to make the second set of sureties primarily liable to the extent of their bond. If they proved insufficient, the first sureties were responsible to the date of their release. The second set must account, first, for any default after their suretyship commenced, and then for any default that may have occurred before.[4] A surrogate ordered that security be filed by an executor within five days, in default of which he should be removed from office. A bond was accordingly filed, pursuant to a statute conditioned, among other things, that the executor should "obey all orders of the surrogate touching the administration of the estate committed to him." Held, the sureties on this bond were liable, not only for all sums received by the executor after the giving of the bond, but also for all sums misappropriated by him before that time. The condition was broken whenever the executor failed to pay over the money, pursuant to the decree of the surrogate.[5]

[1] Robinson v. Hodge, 117 Mass. 222. To a similar effect, see Gookin v. Sanborn, 3 New Hamp. 491.

[2] Owen v. The State, 25 Ind. 371.

[3] Goode v. Burford, 14 La. An. 102.

[4] Morris v. Morris, 9 Heisk. (Tenn.) 814.

[5] Schofield v. Hustis, 9 Hun, 157;

§ 498. **Liability and rights of surety of two executors or administrators, when one dies or ceases to act.**—Where two executors or administrators unite in one bond, they are jointly and severally liable as principals to indemnify the surety on their official bond, who has been compelled to pay money for the default of one of them.[1] Where there were two administrators, and one of them removed from the state, and proceedings were had in the county court, which amounted to a revocation of the letters of such removing administrator, it was held that the sureties on the joint administration bond were liable for the subsequent acts of the remaining administrator during the time of his separate administration.[2] A and B became joint administrators of an estate, and gave a joint bond as such, with C as surety. Property came into their hands, and A died before any devastavit was committed. All the property then came into B's hands, and he became sole administrator, as the law provided, and afterwards committed a devastavit and died; C having been compelled to pay for this devastavit, it was held that he might by suit in chancery, recover indemnity from the estate of A.[3]

§ 499. **Surety of administrator not liable for rents nor for proceeds of sale of real estate.**—As a general rule, the sureties on an administrator's official bond are not liable for the proceeds of the sale of real estate belonging to the decedent.[4] And this is so, even though such proceeds are charged in the account of the administration, as settled by the orphans' court.[5] So, as a general rule, such sureties are not liable for rents of the real estate of the decedent accruing after his death.[6] But it has been held that the sureties on an administrator's official bond are liable for such rents collected by him, as were due the intestate at the time of his death, or as were collected by the administrator upon a contract made by the intestate, which passed into the hands of the administrator.[7]

Holding the sureties on the first bond of an executor liable for money realized from the sale of land for the payment of debts, when a second bond has been given with respect to such money, see Reno *v.* Tyson, 24 Ind. 56.

[1] Overton *v.* Woodson, 17 Mo. 453.

[2] State *v.* Rucker, 59 Mo. 17.

[3] Dobyns *v.* McGovern, 15 Mo. 662; *contra*, Brazier *v.* Clark, 5 Pick. 96.

[4] Commonwealth *v.* Hilgert, 55 Pa. St. 236; Jones *v.* Hobson, 2 Randolph (Va.) 483.

[5] Commonwealth *v.* Gilson, 8 Watts (Pa.) 214.

[6] Smith *v.* Bland, 7 B. Mon (Ky.) 21.

[7] Wilson *v.* Unselt, 12 Bush (Ky.) 215.

§ 500. **Sureties of administrator only liable for his official misconduct.**—An administrator's official bond only binds the sureties therein for the performance of his duties as administrator. Where, therefore, upon the petition of an administrator and the distributees of an estate, a slave was ordered to be sold (which the administrator, as such, had no right to sell), and the administrator was appointed commissioner to make the sale, it was held that the sureties on his official bond were not liable for the proceeds of such sale in the event of his failure to pay the same over.[1] The sureties of an administrator, with the will annexed, cannot be held liable for funds which he received, not as administrator, but as agent for the widow and heirs, though he has charged himself with such funds as administrator.[2] The heirs of an estate agreed among themselves that the estate should be sold on credit, and notes taken for it "indorsed to the satisfaction of the administrator," so that the estate might be divided, and an order of court was entered to that effect. The administrator sold the estate, but did not take good indorsers. Held, the sureties on his official bond were not liable for his default in that regard, as it was no part of his official duty to take such notes.[3]

§ 501. **Miscellaneous cases holding surety of executor or administrator liable.**—The sureties on the official bond of an administrator are liable for the increased value of land purchased by him with funds of the estate, on the principle that a trustee shall make nothing by the trust fund.[4] An administrator purchased certain real estate of the decedent at probate sale. He was prohibited by law from doing this, but the sale to him was ratified by the heirs. Held, this ratification by the heirs did not discharge the sureties on the administrator's official bond from liability for money belonging to the estate for which he did not account.[5] Where an administrator had wasted the estate of his intestate and was himself insolvent, it was held that if the sureties on his official bond were able to respond, all legal remedies should be exhausted against them before equity would subject the estate, which had passed into the hands of the heirs, to the payment of a debt of the decedent.[6] It has been held, that while the official bond of an administrator should be made to the

[1] Reeves *v.* Steele, 2 Head (Tenn.) 647.

[2] Shields *v.* Smith, 8 Bush (Ky.) 601.

[3] Hebert *v.* Hebert, 22 La. An. 308.

[4] Watson *v.* Whitten, 3 Richardson, Law (So. Car.) 224.

[5] Todd *v.* Sparks, 10 La. An. 668.

[6] Pyke *v.* Searcy, 4 Port, (Ala.) 52.

state, it is not void, if made to the justices of the county court.[1]

§ 502. **Miscellaneous cases holding surety of executor or administrator not liable.**—If the effects of an intestate are carried off by a public enemy after administration committed, it shall exonerate the sureties on the administrator's official bond.[2] The sureties on an administrator's official bond are not liable to any one except the creditors and heirs of the estate. They are not therefore liable to a subsequent purchaser of real estate of the decedent, who has been injured by the act of the administrator in selling such real estate without the formalities prescribed by law.[3] A statute provided that if the sureties on an administration bond felt insecure, they might petition the court for relief, and the court should "make such order or decree as * (should) be sufficient to give relief to the petitioner." Held, the court might by its order discharge the sureties from future, but not from past, liabilities.[4] If the administration is taken away from an administrator by order of court, the liability of the sureties on his official bond ceases for everything except his past misbehavior.[5] This is true, even though the removed administrator is afterwards appointed administrator *de bonis non* of the same estate.[6] An ordinary administration bond, given by an administrator *de bonis non* does not bind the sureties therein for the payment of legacies.[7] The same person was appointed administrator of the same estate in two different states, and gave bond with sureties in each: Held, the sureties in one state were not liable for property received by him in the other state, even though he removed the property to the former state and there converted it, and returned the proceeds to the proper tribunal as assets.[8]

[1] Johnson *v.* Fuquay, 1 Dana (Ky.) 514. For a case holding under peculiar circumstances that the surety of an executor is not discharged by the application of the proceeds of his indemnity under the order of the county court, see Commonwealth *v.* Rogers, 53 Pa. St. 470.

[2] Ordinary *v.* Corbett, Bay (So. Car.) 328.

[3] Longpre *v.* White, 6 La. (Curry) 388.

[4] Trimmier *v.* Trail, 2 Bailey Law (So. Car.) 480.

[5] Polk *v.* Wisener, 2 Humph. (Tenn.) 520.

[6] Enicks *v.* Powell, 2 Strobh. (Eq.) (So. Car.) 196.

[7] Small *v.* Commonwealth, 8 Pa. St. 101.

[8] Keaton's Distributees *v.* Campbell, 2 Humph. (Tenn.) 224. As to what need be stated concerning assets in the hands of an administratrix in a declaration against the surety on her official bond, see People *v.* Dunlap, 13 Johns. 437.

CHAPTER XXII.

OF STATUTES RELATING TO SURETIES AND GUARANTORS.

§ 503. **Who entitled to avail themselves of statutes relating to securities, etc.**—In various states statutes have been enacted affecting the rights and remedies of sureties in a greater or less degree. While the statute of frauds has been generally enacted, has but one end in view so far as it relates to sureties, and is very uniform in its terms, other statutes which affect sureties have not been so generally enacted. These latter statutes often relate to different branches of the subject of suretyship, and when they relate to the same thing their verbiage and effect are often different. As such statutes are to a greater or less extent local, no exhaustive discussion of them will be attempted. Such cases as have been observed in the preparation of this work, and as are not elsewhere noted, will be here referred to. It sometimes becomes a question as to who may avail themselves of such enactments. Where a statute provided that "When any person shall become bound as security by bond, bill or note for the payment

of money," such person might notify the creditor to proceed against the principal, it was held that an indorser of a negotiable instrument was not such a surety as was contemplated by the statute.[1] It has been held that an accommodation indorser of a note cannot avail himself of a statute allowing "sureties" to recover judgment by motion against a principal.[2] Where a statute provided that "When any person or persons shall hereafter become bound as security or sureties upon any bond, bill or note," such person might notify the holder to put the same in suit, it was held that one of the signers of a joint and several note, who was in fact a surety, could not avail himself of the statute where there was nothing on the note to indicate the fact of suretyship[3] The same thing was held where a statute provided "That no person shall be sued as indorser or guarantor, or as security, unless suit shall have been, or is, simultaneously commenced against the principal."[4] A statute provided that all parties to a "fraudulent and deceitful conveyance," etc., should forfeit and pay a penalty, etc., which forfeiture should be equally divided between the party aggrieved, etc.: Held, the surety of a grantor in a fraudulent conveyance was to be regarded as the party aggrieved by such conveyance from the date of his suretyship, and before he paid any portion of the debt, and his right to recover the penalty given to the party aggrieved was perfected by paying the debt, and dated from the time of his becoming surety.[5]

§ 504. **What notice to sue is sufficient.**—A statute which has been very generally enacted, places it in the power of the surety, by a notice in writing, to require the creditor to put the claim in suit. It is well settled that the notice in such case must, in order to avail the surety, be a positive demand to bring suit. Thus, a statute provided that a surety might by notice in writing, "require the creditor to bring suit." A surety wrote to the creditor: "I am desirous that you should bring suit on M's note, on which I am surety, and would prefer that you enter suit in this county early in August, so that the principal would not have

[1] Bates *v.* Branch Bank at Mobile, 2 Ala. 689. To the same effect, see Clark *v.* Barrett, 19 Mo. 39; Ross *v.* Jones, 22 Wallace, 576; Devinney *v.* Lay, 19 Mo. 646.

[2] Harvey *v.* Bacon, 9 Yerg. (Tenn.) 308.

[3] Payne *v.* Webster, 19 Ill. 103.

[4] Ritter *v.* Hamilton, 4 Texas, 325; Ennis *v.* Crump, 6 Texas, 85; Lewis *v.* Riggs, 9 Texas, 164.

[5] Beach *v.* Boynton, 26 Vt. 725.

the same time to dodge:" Held the notice was not sufficient. There was no demand or requisition, but a mere expression of the surety's desire that a suit should be brought.[1] The mere request by the surety, that the creditor will put the debt in a train of collection, is not sufficient.[2] A notice as follows: "Sir, you are hereby notified that I will not stand good as security any longer on the note you hold against Wm. Upton, and myself as security," is not a sufficiently explicit requisition to sue.[3] A statute provided that a surety might "require by notice in writing of the creditor, forthwith to put the bond, etc. in suit." A surety gave the creditor a notice as follows: "I wish you to collect the debt off of Polson, wherein I am security." Held, this was not a sufficient requsition to sue.[4] Where, under a similar statute, a surety sent a creditor by telegraph the following notice: "Express Nowland & Co's. note to Esquire Bennett for collection today. Don't fail." Held, the notice was not sufficient, as it did not require the creditor to institute a suit at all, but merely requested that the note be sent to Bennett for collection.[5] A statute provided that a surety might request the creditor to bring suit "on the contract," or allow him to do so. A surety notified the creditor to sue the principal. Held, this was not sufficient, as it should have required the creditor to sue the contract, and the surety as well as the principal.[6] A notice by the surety to the creditor, as follows: "Will no longer stand security for the principal debtor, unless suit is commenced, and prosecuted according to law," has been held sufficient, although the note is not described nor referred to, the creditor not showing that he was actually misled. Technical accuracy is not required. It is sufficient if the notice is positive, and the creditor is not misled.[7] A statute provided that a surety might, by notice, require the creditor to sue or to permit the surety to commence suit in the creditor's name. A

[1] Savage's Admr. v. Carleton, 33 Ala. 443; Bethune v. Dozier, 10 Ga. 235. See, also, Fensler v. Prather, 43 Ind. 119.

[2] Bates v. State Bank, 7 Ark. (2 Eng.) 394.

[3] Lockridge v. Upton, 24 Mo. 184.

[4] Parrish v. Gray, 1 Humph. (Tenn.) 88.

[5] Kaufman v. Wilson, 29 Ind. 504. For other instances in which the notice to sue was held insufficient, see Rice v. Simpson, 9 Heisk. (Tenn.) 809; Baker v. Kellogg, 29 Ohio St. 663.

[6] Harriman v. Egbert, 36 Iowa, 270. On the same subject, see Christy's Admr. v. Horne, 24 Mo. 242.

[7] Routon's Admr. v. Lacy, 17 Mo. 399.

surety wrote to the creditor informing him that "he wished him to see to collecting the note in suit," as he did not wish to be surety any longer. Held, the notice was insufficient. The court said: "The surety must give such notice as the statute designates, before he can claim to be discharged—that is, he must notify the creditor to sue, or permit him to do so."[1] A statute provided that if sureties notified the creditor to proceed to collect his debt, and he did not proceed for three months, the sureties should be discharged. A surety notified the creditor to proceed, but did not state in the notice that he intended to avail himself of the benefit of the act if suit was not brought: Held, it was not necessary for the notice to state that the surety intended to avail himself of the benefit of the statute.[2]

§ 505. **To whom the notice to sue must be given.**—The statute usually provides that the notice to sue shall be given to the creditor. With reference to this it has been held that the creditor to whom the notice should be given is the party having the legal title and the right to institute a suit.[3] It has also been held that the proper person to notify was the holder and equitable owner of the note on which the surety was liable, although the legal title was in another.[4] Where a bank was the creditor, a notice to its cashier has been held sufficient.[5] Where there are several obligors named in the instrument, it has been held that the notice must be served on all of them.[6] Where a bank was the creditor, it was held that the service of a notice to sue on the clerk of the trustees of the bank, was not sufficient.[7] It has also been held that the service of such a notice on the attorney at law of the creditor who has the note, on which the surety is liable, in his hands for collection, is not sufficient.[8] It has been held that the surety, in order to avail himself of such a notice, must show that

[1] Hill v. Sherman, 15 Iowa, 365, per Baldwin, C. J. See, also, on this subject, Shehan v. Hampton, 8 Ala. 942.

[2] Denson v. Miller, 33 Ga. 275. See, also, on this subject, Stevens v. Campbell, 6 Iowa (Clarke) 538. As to when a surety may by virtue of a special statute have the principal, who is about to leave the state, arrested, see Ruddell v. Childress, 31 Ark. 511.

[3] Gillilan v. Ludington, 6 West Va. 128.

[4] Overturf v. Martin, 2 Ind. (2 Carter) 507.

[5] The Bank v. Mumford, 6 Ga. 44.

[6] Kelly v. Matthews, 5 Ark. (Pike) 223.

[7] Adams v. Roane, 7 Ark. (2 Eng.) 360.

[8] Cummins v. Garretson, 15 Ark. 132. To similar effect, see Driskill v. Board of Commissioners, 53 Ind. 532.

the notice was given to the person who, at the time, was the legal holder of the instrument on which the surety was liable. The burden of proof is on the surety to establish that fact.[1]

§ 506. **Against whom suit should be brought when notice is given.**—It sometimes becomes a question as to the persons against whom suit should be brought when a statutory notice to sue is given. Where a statute provided that a surety might notify the creditor to sue all the parties liable on any obligation, and if suit was not instituted the surety should be discharged, it was held that it was not necessary for the creditor, in order to prevent the discharge of the notifying surety, to sue such surety. It was sufficient if all the other parties were sued, the intention being to prevent loss from negligence, in suing the principal and co-sureties.[2] Where the statute provided that the surety might require the creditor "forthwith to put the bond, bill or note in suit," it was held that the creditor was not obliged to sue the principal first, but might sue the surety and the principal together, or the surety alone, if the circumstances warranted a suit against him alone. The surety might, by statute, if sued alone, bring the principal in by notice, and have judgment entered against him at the same time as against the surety.[3] But where the statute provided that the surety might "give the holder of the obligation notice in writing forthwith to put the obligation in suit," and the creditor, upon notice given him, sued the surety alone, who gave the notice, and did not sue the principal, it was held the surety was discharged. It did not appear that the surety had a right to bring the principal in by notice, as in the last case. The court said the object of the law was to relieve the surety, and to hold the surety bound under the above circumstances, would be a mockery.[4] A statute provided that a creditor should, within a stated time after notice from a surety, sue the principal and surety. Such a notice having been given, the creditor sued the surety, who lived in the same county he did, but failed to sue the principal who lived in another county. Held, he was not obliged to go out of the county to sue the principal, and the surety was not discharged.[5] Under similar statutes, it has been held that

[1] England *v.* McKamey, 4 Sneed (Tenn.) 75; Boyd *v.* Titzer, 6 Cold. (Tenn.) 568.

[2] Perry *v.* Barret, 18 Mo. 140.

[3] Scott *v.* Bradford, 5 Port. (Ala.) 443.

[4] Starling *v.* Buttles, 2 Ohio, 303.

[5] Hughes *v.* Gordon, 7 Mo. 297.

be brought, he asks the creditor to indulge the principal, this is a waiver of the notice, but it is otherwise if he does not request such indulgence until after the expiration of the time in which suit should be brought.[1] If, after a surety has notified the creditor to bring suit, he subsequently consents to the dismissal of the suit brought, pursuant to such notice, he will remain bound without any new promise. The fact that the creditor, on the trial of the case against a surety, does not object to oral evidence of a notice to sue, does not amount to a waiver of his right to insist that such notice must be in writing in order to bind him.[2]

§ 509. **How fact that surety is indemnified affects his right to require creditor to sue.**—Where the principal, in order to indemnify his sureties, mortgages to them property sufficient for that purpose, it has been held that such sureties cannot avail themselves of the statute authorizing sureties to require the creditor to bring suit. The court said the surety is "allowed to interpose and hasten the collection of the debt only upon the ground that delay is hazardous to his rights. Although bound for its payment, it is not properly his debt, and where the principal debtor places money or conveys property of ample value to satisfy and pay the debt, there remains no equitable ground upon which a claim to hasten the collection rests."[3] Evidence that a surety was indemnified by his principal, has been held competent on the issue whether or not the surety had required the creditor to proceed against the principal, as allowed by statute.[4]

§ 510. **How death of principal affects right of surety under statute.**—A statute provided that "no person shall be sued as indorser or security unless suit has been first or simultaneously commenced against the principal, provided the principal is within the jurisdiction of the courts of the Republic." The principal was dead, and suit was commenced against the surety without any suit being first commenced against the principal or his estate: Held, the surety was properly sued. The principal was not within the jurisdiction of the courts of the Republic.[5] Another statute provided that a surety might, by writing, require "the person having such right of action forthwith to commence suit

[1] Bailey *v.* New, 29 Ga. 214.

[2] Davis *v.* Payne, 45 Iowa, 194.

[3] Wilson *v.* Tebbetts, 29 Ark. 579, per Walker, J.

[4] Bailey *v.* New, 29 Ga. 214.

[5] Scott *v.* Dewees, 2 Texas, 153; Ennis Crump *v.*, 6 Texas, 85. To similar effect, see Boggs *v.* The State, 46 Texas, 10.

against the principal debtor and other parties liable": Held, a surety could not, after the death of the principal, exonerate himself by notifying the creditor to present his claim against the estate of the principal. The case was not within the meaning of the statute.[1]

§ 511. **Solvency of principal makes no difference with reference to notice to sue—Statute must be literally complied with.** —Where the creditor fails to sue in pursuance of the statutory notice, it has been held that the fact that the principal was and remained solvent would not prevent the discharge of the surety. The court said: "The statute is imperative. It leaves no discretion with the creditor. Whether the principal debtor be insolvent or not, it is the privilege of the surety to require suit to be brought and diligently prosecuted to final judgment, that the ability of the principal to pay may be tested."[2] A statute provided that a surety might notify the creditor in writing to proceed, and if he did not the surety should be discharged, provided he proved by two witnesses, in open court, the delivery of the notice. Held, that proof by one witness that the creditor admitted he had been notified was not sufficient. The statute must be literally obeyed to entitle the surety to its benefit.[3]

§ 512. **How discharge of one surety by statutory notice to sue affects other sureties.**—Where a portion of several sureties are discharged by the failure of the creditor to sue, in pursuance of the statutory notice given him by them, it has been held that all the sureties are thereby wholly discharged.[4] It has also been held in such case, that the surety who gave no notice was only exonerated to the extent that the surety who was discharged would have been liable to contribute.[5] But where the statute provided that "the surety who shall have given such notice shall be discharged from liability," it was held that his discharge did not affect the liability of the surety who gave no notice.[6] Where a statute provided that "where any person or persons" were sureties, and ap-

[1] Hickman v. Hollingsworth, 17 Mo. 475.

[2] Reid v. Cox, 5 Blackf. (Ind.) 312, per Sullivan, J.; Overturf v. Martin, 2 Ind. (2 Carter) 507.

[3] Miller v. Childress, 2 Humph. (Tenn.) 320.

[4] Jones v. Whitehead, 4 Ga. 397; Wright's Admr. v. Stockton, 5 Leigh (Va.) 153.

[5] Routon's Admr. v. Lacy, 17 Mo. 399.

[6] Ramey v. Purvis, 38 Miss. 499. To similar effect, see Wilson v. Tebbetts, 29 Ark. 579.

prehended the insolvency of the principal, it should be lawful "for such security or securities to give notice," etc., it was held that all the sureties, or any less number, might avail themselves of the statute.[1] If one surety is discharged by reason of having given the creditor the statutory notice to sue, and another surety afterwards pays the debt, he cannot recover contribution from the surety who is discharged as aforesaid.[2]

§ 513. **Miscellaneous cases as to statutory notice by surety to creditor requiring him to sue.**—Where a surety, in the manner prescribed by statute, notified the creditor to sue the principal, it was held that the disturbed condition of the country was no excuse for not commencing the suit within the statutory period.[3] A stockholder of a bank, who is a surety, may give the bank, which is the creditor, the statutory notice to sue.[4] It has been held that the surety on a bond given to a county for the use and benefit of the fund arising from the sale of swamp lands in the county, cannot exonerate himself from liability by notifying the county to sue on the bond.[5] A statute provided, that where a surety apprehended his principal, was about to become insolvent, he might notify the creditor to sue. Held, his apprehension of the fact could not be put in issue.[6] It has been held, that the creditor who is notified to sue, is only bound to prosecute his claim to judgment and execution at law, and is not bound to exhaust all equitable remedies against the principal.[7] Where a creditor is obliged by statute to levy on the property of the principal first, and does so, and the principal gives a forthcoming bond for the property, but does not afterwards surrender such property, it has been held that the creditor is not obliged to sue the forthcoming bond before coming on the surety.[8] A statute provided that a surety might, by notice, require the creditor to sue or allow him to do so, and if the creditor failed to do either for ten days, the surety should be discharged. Such a notice having been given, and nothing having been done for ten days,

[1] Wright's Admr. v. Stockton, 5 Leigh (Va.) 153.

[2] Letcher's Admr. v. Yantis, 3 Dana (Ky.) 160. See, also, on this subject, Perry v. Barret, 18 Mo. 140.

[3] Cockrill v. Dye, 33 Mo. 365.

[4] First National Bank v. Smith, 25 Iowa, 210.

[5] Jasper County v. Shanks, 61 Mo. 332.

[6] First National Bank v. Smith, 25 Iowa, 210.

[7] Harrison's Exrs. v. Price's Exrs. 25 Gratt. (Va.) 553.

[8] Brown v. Brown, 17 Ind. 475.

it was held the surety was discharged. It was the creditor's duty to act himself, or notify the surety that he could act, within the ten days.[1] It has been held, that after a judgment against sureties, they cannot require the creditor to sue the principal, who has not yet been sued.[2]

§ 514. **Constitutionality of statutes providing summary remedies in case of sureties.**—The constitutionality of statutes which provide summary remedies against and on behalf of sureties, has been questioned, but they have generally been held to be constitutional. Thus, statutes which provide that when a judgment which has been appealed from is affirmed, judgment shall at the same time be entered against the surety in the appeal bond;[3] which authorize the issuing of a fee bill against a person who becomes security for costs in a cause;[4] and which authorize the issuing of an execution against the surety of a garnishee at the same time it is issued on a judgment against the garnishee,[5] have all been held to be constitutional. The surety is in such case no more deprived of the right of trial by jury, than if he had signed a power of attorney to confess judgment. He knows the law when he signs the obligation, and must be presumed to consent to whatever lawfully follows. The terms of the law are as much a part of his obligation as if they had been written in it. A statute authorizing summary process against delinquent tax collectors and their sureties, is not an infringement of the fourth and fifth amendments of the constitution of the United States, nor is it a violation of the state constitution prohibiting unreasonable searches and seizures of property without due process of law.[6] A statute providing that a surety who has paid the debt may by motion recover a judgment for indemnity against his principal, is constitutional.[7]

§ 515. **Construction of statutes affording summary remedies in cases of sureties.**—It is well settled that statutes authorizing summary remedies by or against sureties, must be strictly construed, and will not be extended by implication.[8] A statute authorizing a summary judgment against one becoming security for

[1] First National Bank v. Smith, 25 Iowa, 210.

[2] Irwin v. Helgenberg, 21 Ind. 106.

[3] Davidson v. Farrell, 8 Minn. 258; Chappee v. Thomas, 5 Mich. 53.

[4] Whitehurst v. Coleen, 53 Ill. 247.

[5] Loh v. Judge of Wayne Circuit, 26 Mich. 186.

[6] Weiner v. Bunbury, 30 Mich. 201.

[7] McCord v. Johnson, 4 Bibb (Ky.) 531.

[8] Garratt v. Eliff, 4 Humph. (Tenn.)

costs, does not authorize such a judgment on an appeal bond providing for the payment of the judgment and costs.[1] A statute provided that in certain cases judgment might be rendered on motion against principal and sureties. In a case otherwise within the statute, the principal was dead: Held, no such judgment could be rendered against the sureties alone.[2] It has also been held that such a judgment cannot be rendered against a principal and part of his sureties, unless the omitted surety is dead and has no administrator. Judgment must be rendered against all who are living, or none.[3] Upon a motion against a constable and his sureties on account of a failure to pay over money collected by him, it was held that a notice to the constable of the intended motion, was sufficient to authorize a judgment against him and his sureties.[4] A statute provided that sureties might, by motion, recover judgment against their principal as soon as judgment was recovered against them. Under this statute it was held that sureties might recover a joint judgment against their principal before they paid the judgment against them, but not afterwards.[5] It was also held in the same case that after the sureties had been sued alone they might confess judgment, and immediately recover judgment against the principal by motion. Under a similar statute it has been held that one of several sureties, against whom judgment has been rendered, cannot recover judgment by motion against the principal. Such a judgment must be in favor of all, or none.[6]

§ 516. **Statute of limitations—Peculiar cases.**—Where a statute provided that the sureties of a postmaster should be discharged unless suit was brought within two years after his default, it was held that suit must be brought within two years after his first default, in order to charge the sureties for anything.[7] Where the limitation as to suits against sureties was seven years, it was held, that a signer of the note, who was in fact a surety,

323; Frost v. Rucker, 4 Humph. (Tenn.) 57; Dibrell v. Dandridge, 51 Miss. 55.

[1] Willard v. Fralick, 31 Mich. 431.

[2] Houston v. Dougherty, 4 Humph. (Tenn.) 505.

[3] Gibson v. Martin, 7 Humph. (Tenn.) 127; Rice v. Kirkman, 3 Humph. (Tenn.) 415. See, also, on this subject, Price v. Cloud, 6 Ala. 248.

[4] Baxter v. Marsh, 1 Yerg. (Tenn.) 460.

[5] Newman v. Campbell, Martin & Yerg. (Tenn.) 63.

[6] Litler v. Horsey, 2 Ohio, 209. As to what such a judgment in favor of the surety must show, see Jones v. Read, 1 Humph. (Tenn.) 335.

[7] United States v. Marks's Sureties, 3 Wallace, Jr. 358.

might avail himself of the statute, although the assignee did not know of the suretyship, and it did not appear from the note.[1] It has been held that the statute of limitations as to sureties, did not apply to a mortgage given by one person for the debt of another, but only applied to the personal liability of the surety.[2]

§ 517. **Pleading.**—A statute provided that where judgment was rendered upon any instrument of writing in which two or more persons were jointly or severally bound, and it appeared by parol, or otherwise, that one was only a surety, judgment should be rendered against him as such, and his property should not be taken till the principal's was exhausted. Held, that no pleadings nor formalities were required to bring the question of suretyship before the court.[3] It has been held that the discharge of the surety by statutory notice must be specially pleaded.[4] So it has been held that a plea that the statutory notice was given, should allege that it was in writing.[5] And it has also been held that such a plea need not allege that the notice was in writing.[6]

[1] Day v. Billingsby, 3 Bush (Ky.) 157.

[2] Hobson v. Hobson's Exr. 8 Bush (Ky.) 665.

[3] Kupfer v. Spinhorst, 1 Kansas, 75; Rose v. Madden, 1 Kansas, 445.

[4] Shehan v. Hampton, 8 Ala. 942.

[5] Headington v. Neff, 7 Ohio, 229.

[6] Coats v. Swindle, 55 Mo. 31.

CHAPTER XXIII.

OF EVIDENCE.

§ 518. **When declarations or admissions of principal not evidence against surety.**—Questions as to the admissibility and effect of evidence, which are peculiar to the relation of principal and surety, frequently arise, and may properly find a place here. As a general rule, where the suit is against a surety alone, admissions or declarations of the principal, which are not a part of the *res gestæ*, and which are made either before the surety became bound,[1] or after the employment for which the surety became

[1] Cheltenham Fire Brick Co. *v.* Cook, 44 Mo. 29.

bound has ceased,[1] or after there has been a breach of the contract on which the surety is liable,[2] are not admissible in evidence. But it has been held that the acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties therein, though he be dead, and therefore not a party to the suit.[3] A entered into a partnership with B for a stipulated time, and C became surety to B for A's conduct as partner for such time. In a suit by B against C on the obligation for the default of A, it was held that the admissions of A, after the expiration of the time for which the partnership was made, were not admissible in evidence against C. The court said: "The defendants were bound for the conduct of * (A) during the term for which they had covenanted, but not for what he might, after the lapse of several years, be induced to say in relation to his conduct during the stipulated term. It is true, that while the principal is acting, his declarations may be so interwoven with his acts as to stand in direct connection with them, and form part of the *res gestæ*, but when he ceases to act, his subsequent declarations have no direct connection with his preceding acts, so as to bind his sureties."[4]

§ 519. **Declarations of principal, evidence against surety in joint suit against them.**—When the suit is against the principal and surety jointly on a joint or joint and several obligation, an admission or declaration of the principal, which is competent evidence against him, is also generally held to be competent against the surety.[5] Such evidence is, of course, admissible against the principal, and in a joint suit on a contract, the recovery must usually be against all or none, and the measure of damages as to

[1] Tenth National Bank *v.* Darragh, 1 Hun (N. Y.) 111; Ashurst *v.* Ashurst, 13 Ala. 781; Chelmsford Company *v.* Demarest, 7 Gray, 1; Commonwealth *v.* Brassfield, 7 B. Mon. (Ky.) 447; Shelby *v.* Governor, 2 Blackf. (Ind.) 289; Pollard *v.* Louisville, C. & L. R. R. Co. 7 Bush (Ky.) 597. *Contra*, Treasurers *v.* Bates, 2 Bailey Law (So. Car.) 362.

[2] Cassitys *v.* Robinson, 8 B. Mon. (Ky.) 279; Hatch *v.* Elkins, 65 New York, 489; White *v.* The German Natl. Bank of Memphis, 9 Heisk. (Tenn.) 475; Wheeler *v.* The State, 9 Heisk. (Tenn.) 393.

[3] Walker *v.* Pierce, 21 Gratt. (Va.) 722.

[4] Hotchkiss *v.* Lyon, 2 Blackf. (Ind.) 222, per Holman, J.

[5] McNeale *v.* Governor, 3 Gratt. (Va.) 299; Atlas Bank *v.* Brownell, 9 Rhode Is. 168; Amherst Bank *v.* Root, 2 Met. (Mass.) 522; see, also, Darter *v.* The State, 5 Blackf. (Ind.) 61; Davis *v.* Kingsley, 13 Ct. 285.

all is the same. A statute provided that a receipt given by a constable in his official capacity, should be evidence against him in a suit to recover the money for which the receipt was given. In a joint suit against a constable and his sureties, it was held that the receipt was *prima facie* evidence against all of them. The court said that whatever would establish the liability against the constable, would establish it against his sureties. "As the constable and his sureties may be joined in the suit, it could not have been the intention of the legislature that proof which, uncontradicted, would be conclusive against the constable to establish the receipt of the money, should not be evidence against the sureties, whose liability is a mere consequence of the establishment of that fact as against the principal."[1] A principal in a joint and several note under seal, signed by himself and two sureties, but all appearing as principals on the note, informed a party who was about to purchase it, that the note was all right and would be paid. All the makers of the note were sued jointly thereon, and joined in their defense. Held, the above declarations of the principal were evidence against all the parties to the note, and precluded the setting up as a defense by any of them that there was fraud in obtaining the note.[2] But in a suit on a promissory note made by B and C, where B made no defense, and C appeared and made a separate defense as surety of B, a letter written by B, containing declarations of his about the matter, was held not admissible as evidence against C.[3]

§ 520. **Instances of admissibility of declarations of principal as evidence against surety.**—Where the effect of the contract is that the surety shall be responsible for the declarations and admissions of the principal, or such declarations and admissions are to furnish the basis upon which others are to act, such declarations and admissions are in these cases generally held to be competent evidence against the surety. Thus, a guarantor agreed to hold himself responsible "for the conduct of my son." The son confessed a judgment for the amount due by him to the creditor. Held, in a suit against the guarantor, that this judgment was admissible, to show the amount of indebtedness of the son. The court said that the guarantor being only collaterally liable, proof

[1] Smith *v.* The Governor, 2 Robinson (Va.) 229, per Allen, J.

[2] Montgomery *v.* Dillingham, 3 Smedes & Mar. (Miss.) 647.

[3] Pierce *v.* Goldsberry, 35 Ind. 317.

of the principal's liability was indispensable to a recovery. "But this liability might have been proved by a confession in writing, or even by parol after his death, if not before; then why not by the more solemn act of confessing it of record?"[1] A guaranty was as follows: "Wilson having proposed to go to Philadelphia in order to purchase goods, I wish you to give him any assistance in your power by letter or otherwise. You may consider me accountable with him to you for any contract he may make." Wilson made a verbal contract with the creditor, which he afterwards acknowledged and recited in a letter. Held, this letter was evidence of the contract in a suit against the guarantor. The court said that the guarantor "having confided to Wilson the making of the contract, confided to him in consequence the power of furnishing evidence of the contract. The contract having been made by parol, without witness, it was impossible to prove it in any other manner than by the subsequent declarations of the party."[2] A agreed in writing to dig such quantity of iron ore not exceeding six hundred tons, as B might be able to sell before a certain date, and if B was not able to sell it, he was not to be under any obligation to take it. B notified A that he had sold six hundred tons of ore, and he wished him to dig it, and A accordingly did so. In a suit brought on a guaranty of the contract made at the same time the contract was made, it was held that B's declaration that he had sold six hundred tons of the ore, was conclusive evidence of that fact against the guarantor. The court said that all parties agreed to look to B to sell the ore, and when B told A that he had sold the ore, A had no right to demand further evidence of the fact. A having acted on the information which B had given him, B was concluded by it, and so were the guarantors, although B was not a party to the suit.[3] By the terms of an agreement, A purchased of B certain lumber, which B was to deliver and A was to examine. In a suit against a surety to the agreement, a written acknowledgment of A that the lumber had been received, was held admissible against the surety. The court said: "By the agreement * (A) was to examine the lumber, and we

[1] Drummond v. Prestman, 12 Wheaton, 515. Holding the admission of the principal with reference to the payment of a lost or destroyed note, competent evidence against a surety, see Admr. of Wilson v. Green, 25 Vt. 450.

[2] Meade v. McDowell, 5 Binney (Pa.) 195, per Tilghman, C. J.

[3] Bushnell v. Church, 15 Ct. 406.

presume was to decide whether it was such as the plaintiff engaged to deliver. And if he were a witness, he would not be permitted to contradict his written acknowledgment."[1] A wrote a letter to B, informing him that C was about to embark in business, and stating, "should they make a bill with you, I will be responsible for the amount." In a suit against A on the guaranty, it was held that evidence that C acknowledged the receipt of the goods, was not admissible. The court said: "The engagement on the part of the defendant was to be responsible for such bill as * (C) should make, and not such bill as they should acknowledge they had made. The defendant had a right to have the delivery proved in the accustomed mode, and not by hearsay evidence."[2] In a suit on two bonds of an administrator, the second having been given upon the application of the sureties on the first to be discharged, it was held that the sureties in the second bond could not give in evidence the declarations of the administrator made at the time of executing the second bond, in order to show when the defalcation occurred.[3]

§ 521. **Where declarations of principal are part of res gestae, they are evidence against surety.**—When the declarations or admissions of the principal are made in the course of the performance of the business for which the surety is bound, so as to become a part of the *res gestae*, they are evidence against the surety.[4] Where it was the custom of a bank cashier to periodically present statements of the condition of the bank's accounts, and on one of such occasions, while such account was being examined, the cashier admitted embezzlements, it was held that such admissions were evidence against his surety. "The statements were made in the course of the duty for the faithful performance of which by the cashier * (the surety) had bound himself. They were made while the cashier was still in office; they accompanied and explained an official act, and must be regarded as part of the *res gestae*."[5] The cashier of a bank being

[1] Reynes *v.* Zacharie's Succession, 10 La. (Curry) 127, per Bullard, J.

[2] Griffith *v.* Turner, 4 Gill (Md.) 111, per Archer, C. J.

[3] Lane *v.* The State, 27 Ind. 108. For a case holding the admissions of the principal inadmissible against the surety, see, also, Kirkpatrick *v.* Howk, 80 Ill. 122.

[4] Blair *v.* Perpetual Ins. Co. 10 Mo. 559; Snell *v.* Allen, 1 Swan (Tenn.) 208; Casky *v.* Haviland, 13 Ala. 314; United States *v.* Cutter, 2 Curtis, 617. See, also, on this subject, Wyche *v.* Myrick, 14 Ga. 584.

[5] Bank of Brighton *v.* Smith, 12 Allen, 243, per Colt, J.

thought guilty of breaches of duty, a list of supposed charges against him for funds not accounted for, and misapplied by him, was presented to him, and he, while still in office, wrote opposite each charge admissions and explanations, and signed his name thereto. Held, these admissions were evidence against him and his sureties, of the facts there stated.[1] Where a clerk during the term of his employment, made a statement of his account, showing a balance due his employers: Held, this was evidence that the amount was due in a suit against the sureties for his conduct.[2] But where a bank cashier, before and after his dismissal from office, verbally and in writing, admitted that defalcations had before such times been made by him, and none of such admissions were made contemporaneously with the acts, but related to past transactions, it was held that such admissions were not a part of the *res gestae*, and were not evidence against the sureties on the cashier's official bond.[3] A county treasurer continued to act as such one day after his term of office expired, and received money and gave receipts for it on that day: Held, his sureties were liable for the money received by him on that day, and his receipts for money then given to tax collectors were *prima facie* evidence of the receipt of the money as against his sureties.[4] In a suit against a justice of the peace and his sureties for money collected by him and not paid over, it was held that his letters written while in office to the execution plaintiff, acknowledging the receipt of the money and a demand for payment, and also containing a promise to pay, were competent evidence.[5] In an action against the sureties on a constable's official bond, to recover damages for his default in not returning an attachment, it was held that evidence that the constable pointed to a wagon and horses, and said the property attached was there, that the plaintiff in attachment asked where the remainder of the property was, and the constable said he had permitted the owner, against whom the attachment ran, to take some horses to get them shod, was admissible as part of the *res gestae*.[6]

[1] Pendleton *v.* Bank of Kentucky, 1 T. B. Mon. (Ky.) 171.

[2] Lysaght *v.* Walker, 5 Bligh (N. R.) 1; *Id.* 2 Dow. & Clark, 211.

[3] Stetson *v.* City Bank, 2 Ohio St. 167.

[4] Placer County *v.* Dickerson, 45 Cal. 12.

[5] Parker *v.* The State, 8 Blackf. (Ind.) 292.

[6] Dobbs *v.* The Justices, 17 Ga. 624. Holding that declarations of a sheriff, after the return day of an execution, but while he is still in office, that he had collected the money, are not com-

§ 522. **How far entries or returns made by a public officer are evidence against his surety.**—The entries made by an officer in public books while in discharge of his duty, or returns made by him to the public authorities, are generally *prima facie*, but not conclusive evidence against his sureties of the facts thus stated. The returns of a receiver of the government to the treasury department, showing the receipt of money by him, were held to be *prima facie*, but not conclusive evidence, in an action by the government against the sureties on his bond. The court said the sureties might show that he received no money, or less than he reported. "The accounts rendered to the department of money received, properly authenticated, are evidence, in the first instance, of the indebtedness of the officer against the sureties, but subject to explanation and contradiction. They are responsible for all the public moneys which were in his hands at the date of the bond, or that may have come into them afterwards and not properly accounted for; but not for moneys which the officer may choose falsely to admit in his hands in his accounts with the government."[1] Entries in the books of a state treasurer, showing the amount which ought to be in the state treasury, are not conclusive evidence against his sureties that such amount was in the treasury.[2] So, the settlements made by a county treasurer with the county court are not conclusive on his sureties, but may be explained or disproved by them.[3] So, if a city treasurer intrusted with the safe keeping of public money, upon his election for a second term, transfers to his books for that term and charges himself with the balance of money for which he is accountable at the end of his first term, it will be competent for the sureties on his bond for the second term to show in exoneration of their liability, that the balance so transferred and charged was not on hand in cash at the time, but had previously been misapplied by the officer.[4] The dockets and records of a court, showing that money has been received by the marshal or his deputies under

petent against his sureties, see Trousdale *v.* Philips, 2 Swan (Tenn.) 384.

[1] United States *v.* Boyd, 5 Howard (U. S.) 29, per Nelson, J.; Bissell *v.* Saxton, 66 New York, 55; *contra*, Baker *v.* Preston, 1 Gilmer (Va.) 235. See, also, Morley *v.* Town of Metamora, 78 Ill. 394.

[2] State *v.* Rhoades, 6 Nevada, 352.

[3] Nolly *v.* Calloway County Court, 11 Mo. 447. See, also, on this subject, Townsend *v.* Everett, 4 Ala. 607; Supervisors of Washington Co. *v.* Dunn, 27 Gratt. (Va.) 608.

[4] Mann *v.* Yazoo City, 31 Miss. 574.

executions, have been held competent evidence against his sureties, and conclusive until reversed by competent authority.[1] So, a sheriff's return on an execution, showing the collection of money thereon, has been held to be conclusive evidence of such facts against the sureties on his official bond in a suit against them for a failure of the officer to pay over such money.[2] Where a judgment rendered by a justice of the peace was entered satisfied by him, it was held that in the absence of a fraudulent combination between the creditor and the justice to defraud the surety, such entry of satisfaction was conclusive evidence against the surety of the receipt of the money by the justice. The court said: "When a judgment of a justice of the peace is entered satisfied, the plaintiff, in order to obtain his money, must resort to the justice. He cannot take out execution on the judgment after satisfaction is entered on the docket, notwithstanding he might know that the satisfaction had been entered without a payment of money. The official entry on the docket is conclusive against the justice and his sureties, and the plaintiff has a right of action against them for his money, without any reference to the manner in which the judgment has been satisfied."[3]

§ 523. **When entries made by deceased principal evidence against surety, etc.**—The bond of a collector of taxes was conditioned for the faithful discharge of his duties, "and that he should keep a full, true and perfect account in writing of his employment, collections and receipts, * as well as deliver up * all the books and accounts entrusted to his care." Held, that a collecting book received by him from his predecessor, and by him delivered to his successor, which contained the names of the parishioners and the sums at which they were rated, and the usual marks made by the collector opposite some of such names, by which he indicated the receipt of the sums assessed on them (the collector being dead), were evidence in a suit against his surety. It was a public book, and it was part of the duty for which the surety undertook that it should be kept and delivered.[4]

[1] Williams *v.* United States, 1 Howard (U. S.) 290.

[2] Bagot *v.* The State, 33 Ind. 262; Price *v.* Cloud, 6 Ala. 248. Holding that an account current filed by an administrator is *prima facie* evidence against his sureties of the amount in his hands, see Lane *v.* The State, 27 Ind. 108.

[3] Modisett *v.* The Governor, 2 Blackf. (Ind.) 135, per Holman, J.

[4] Goss *v.* Watlington, 6 Moore, 355; *Id.* 3 Brod. & Bing. 132.

An entry made by a deceased collector of taxes in a private book kept by him for his own convenience, whereby he charged himself with the receipt of money, was held to be evidence against his surety of the fact of the receipt of such money in an action on a bond conditioned for the due payment of the taxes by the collector, although the parties by whom the money had been paid were alive and might have been called as witnesses. This was held, upon the general principle that the entry was to the prejudice of the party who made it.[1] In an action on a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duties as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money. The condition of the bond was that the clerk should "faithfully discharge his duty as clerk. It is part of the duty of a banker's clerk to make entries (in the books kept by him) of all sums of money received by him for his employers; such entries made by the clerk must, as against his sureties who contracted for the faithful discharge of his duty, be taken *prima facie* to have been made by him in discharge of that duty, * because the entries were made by him in those accounts which it was his duty as clerk to keep, and which the defendants had contracted that he should faithfully keep."[2] The entries made by a clerk of a division court, in the course of his business, in books kept in pursuance of the provisions of an act to that effect, have been held competent evidence against his sureties.[3]

§ 524. **When and how far judgment against principal evidence against surety.**—Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit, or when he is made privy to the suit by notice, and the opportunity being given him to defend it, a judgment against the principal alone is, as a general rule, evidence against the surety of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment.[4] This was

[1] Middleton *v.* Melton, 10 Barn. & Cress. 317; *Id.* 5 Man. & Ryl. 264.

[2] Whitnash *v.* George, 8 Barn. & Cress. 556, per Lord Tenterden. Same case reported under name of Whitmarsh *v.* Genge, 3 Man. & Ryl. 42.

[3] Middlefield *v.* Gould, 10 Up. Can. C. P. R. 9.

[4] Thomas *v.* Hubbell, 15 New York,

held where the suit against the principal alone was defended by the surety as agent of the principal. In this case the court said: "I am aware of no case where a mere surety is bound to defend in order to save himself from injury by a judgment or decree against his principal, even though he have notice both from the creditor and the principal. It is the business of the latter to save his surety from all harm. The principal is the indemnitor, and without being personally sued, I do not see upon what ground the surety could claim to defend as a matter of right for any purpose."[1] Where the effect of the undertaking of the surety is that he shall be liable for the result of a suit against his principal, he is conclusively bound by the judgment in such suit, even though he is not a party to it, and have no notice of it. Thus, a sequestration bond provided that if the plaintiffs "shall pay or cause to be paid all such damages as may accrue in case it shall appear and be decreed that said sequestration was wrongfully sued out," then the bond should be void. Judgment was rendered against the plaintiffs, and it was held that it was conclusive evidence against the sureties that the property sequestered did not belong to the plaintiffs. The sureties agreed to be liable if it was "decreed" that the sequestration had been wrongfully sued out, and it had been so decreed.[2] The condition of the official bond of the receiver of an insolvent insurance company was that he should faithfully conduct himself in his office, faithfully perform its duties as required by law, and in obedience to the directions of the court, and truly and faithfully account for and pay over the money of the company coming to his hands. After due proceedings and a full hearing, a justice of the court pronounced the receiver in default, and that a certain sum was due from him. Held, the order of the court was competent evidence against the sureties of the receiver, both of the default and of the amount due.[3] These rules are plain and simple, and com-

405; Lartigue v. Baldwin, 5 Martin (La.) O. S. 193; Firemens Ins. Co. v. McMillan, 29 Ala. 147; Moss v. McCullough, 5 Hill (N. Y.) 131; Arrington v. Porter, 47 Ala. 714; Douglas v. Howland, 24 Wend. 35. See, also, on this subject, Stoops v. Wittler, 1 Mo. Appl. Rep. 420.

[1] Jackson v. Griswold, 4 Hill (N.Y.) 522, per Cowen, J.

[2] Jones v. Doles, 3 La. An. 588. See, also, Lee v. Clark, 1 Hill (N. Y.) 56; Poillon v. Volkenning, 11 Hun (N.Y.) 385; Chamberlain v. Godfrey, 36 Vt. 380.

[3] Commonwealth v. Gould, 118 Mass. 300.

mend themselves to the reason, but they have not always been observed in the cases where the fact would warrant their application.

§ 525. **Cases holding judgment against principal prima facie evidence against surety, etc.**—In an action against a constable and the sureties on his official bond, to recover damages for taking the property of the plaintiff under a writ of replevin against a third person, a verdict and judgment against the constable in an action of trespass for taking the property, was held to be *prima facie* evidence against the sureties, although they had no notice of the suit against the constable.[1] A judgment was recovered against a receiver of the effects of a partnership. Held, this was *prima facie* evidence against the sureties on his bond.[2] A transcript of the record of a suit brought in one of the United States, on a warranty contained in a bill of sale of a slave against a surety therein, where the principal had notice of its pendency, has been held to be evidence in another of those states, against the principal, of every fact decided between the immediate parties to such suit, and if such fact was found *prima facie* evidence at least, that the principal had no title to the slave.[3] Where a motion was made against a sheriff for the default of his deputy, upon which the sheriff with the assent of the deputy, but without the knowledge of his sureties, confessed judgment, it was held the record of this judgment was admissible evidence against the deputy's sureties upon a motion by the sheriff against the deputy and his sureties.[4] It has also been held that a judgment against a tenant for rent, is admissible in evidence, in an action against a surety on the lease.[5]

§ 526. **Cases holding judgment against principal conclusive against surety—Impeaching judgment for fraud, etc.**—A judgment was recovered against a party, and he was arrested on execution, and entered into a recognizance with surety to appear for examination as a poor debtor. He did not appear, and in a suit against the surety he offered to prove that the principal

[1] State *v.* Jennings, 14 Ohio St. 73. See, also, on this subject, M'Broom *v.* The Governor, 4 Port (Ala.) 90.

[2] Whitehead *v.* Woolfolk, 3 La. An. 42.

[3] Thomas *v.* Beckman, 1 B. Mon. (Ky.) 29.

[4] Jacobs *v.* Hill, 2 Leigh (Va.) 393.

[5] Strong *v.* Giltinan, 7 Philadelphia (Pa.) 176. Holding that the return of a sheriff *non est inventus* is *prima facie* evidence against bail that the principal is not found; see Hall *v.* White, 27 Ct. 488.

had paid the debt before the original judgment was recovered. Held, he could not be permitted to do so, and the judgment was conclusive evidence of the debt thereby ascertained, both against the principal and the surety.[1] If a creditor makes objections to prisoner's discharge under an insolvent debtor's act, and they are decided against him, it has been held that he cannot afterwards bring the same matters in question in a suit against the sureties on the bond for the prison rules.[2] In a suit against sureties on a bond conditioned for the payment of such costs as the obligee shall recover against the principal in a suit then pending, to which the sureties are not parties, it is open to the sureties to impeach the judgment rendered in the last named suit upon the ground of fraud, by showing, that for the purpose of defrauding the sureties, and by collusion between the parties, the judgment was rendered for more than the just amount.[3] W assigned in writing to C and M a judgment against H, the assignment containing this condition: "If the said C and M shall fail in collecting said judgment, after prosecuting said H to insolvency, then I agree to be responsible for, and hereby guaranty the sum of $400 of said judgment to them, and no more." C and M sued H on the judgment, and he set up the defense of payment, and sustained it. No notice of this defense was given to W. In a suit on the guaranty it was held that W was not estopped by the judgment in favor of H, from showing that H did owe the money and that it could have been collected from him.[4]

§ 527. **How far judgment against surety evidence against principal.**—In an action of assumpsit by a surety against his principal to recover indemnity for money paid for the principal by the surety, it was held that the record of a judgment (showing the relation of the parties) against the surety, although rendered without notice to the principal, was *prima facie* evidence of the sum due by the principal, of the obligation of the surety to pay, and of the assent of the principal to the payment, and also that an execution issued in said cause against the surety, and the return upon it showing the payment of the money, was evidence

[1] Way v. Lewis, 115 Mass. 26.

[2] Brevard v. Wylie, 1 Richardson Law (So. Car.) 38. Holding a judgment against the principal conclusive against the surety, by reason of a statutory provision, see State v. Pike, 74 Nor. Car. 531.

[3] Manufacturing Co. v. Worster, 45 New Hamp. 110.

[4] Woodward v. Moore, 13 Ohio St. 136.

of such payment.[1] In such a case, where the record did not show the fact of suretyship, it was held that it might be shown by other evidence.[2] Where a judgment has been rendered against the principal and surety in a bond, and the surety upon satisfying the judgment, sues the principal for indemnity, the principal cannot set up that the bond was founded upon an illegal consideration; that is matter of defense which should have been set up in the first suit, and that suit is conclusive of the question.[3]

§ 528. **Judgment rendered against principal in favor of surety without notice, no evidence in another state.**—A statute of Tennessee authorized sureties who had paid the debt of their principal, to obtain judgment against him by motion and without notice to him. A judgment rendered in that way against a principal, who at the time of the rendition thereof was a citizen of Louisiana, was held to be no evidence of indebtedness against the principal in a suit for indemnity brought against him in Louisiana by the surety. The court held, that without notice to or appearance by the principal, the judgment was of no effect, and said: "We cannot believe ourselves bound to enforce against our citizens, or to consider binding on them, a judgment obtained under such a law, which is derogatory to the first principles of justice."[4]

§ 529. **When judgment against one surety evidence against a co-surety.**—Two sureties, A and B, were bound by separate bonds, executed at different times, for the conduct of a cashier, who made default, for which both sureties were liable. A was sued for such default, and gave notice thereof to B. Judgment was recovered against A, which he paid, and sued B for contribution. Held, the judgment against A was *prima facie* evidence against B of the fact of the defalcation, the time of its occurrence, and its amount.[5] In an action for contribution between co-sureties, the record of a judgment recovered by the creditor against the principal and one of the sureties, to which the other surety is not a party, is competent evidence to prove the rendition of such judgment, by way of inducement to evidence that the surety against whom it was rendered has paid

[1] Snider v. Greathouse, 16 Ark. 72; Chipman v. Fambro, 16 Ark. 291.

[2] Bone v. Torry, 16 Ark. 83.

[3] Pitts v. Fugate, Admx. 41 Mo. 405.

[4] McNairy v. Bell, 5 Robinson (La.) 418, per Morphy, J. To the same effect, see Sevier v. Roddie, 51 Mo. 580.

[5] Breckinridge v. Taylor, 5 Dana (Ky.) 110. See, also, Cobb v. Haynes, 8 B. Mon. (Ky.) 137.

it.[1] One of four guarantors was sued for the debt of the principal and a judgment was recovered against him, which he paid, and sued his co-guarantors for contribution. Held, they were not concluded by the judgment against the plaintiff (they not having had any notice of the suit in which it was rendered), but they might make every defense they could have made in the original suit, if they had been notified, including want of due diligence by the creditor in endeavoring to collect the debt.[2]

§ 530. **How far judgment against sheriff evidence against sureties on his official bond.**—As to whether a judgment against a sheriff or constable for official misconduct is competent evidence of that fact against the sureties on his official bond, and if so, what is its effect, is a question upon which there is great and irreconcilable conflict of authority, and it is difficult to determine where the preponderance lies. Some of the cases hold that such a judgment is no evidence at all against such sureties. Thus, a suit was brought against a sheriff and the sureties on his official bond, the ground of action being that the sheriff had committed a trespass by levying an execution. A judgment had been previously recovered against the sheriff in a suit against him alone for the same trespass. Held, that this judgment was no evidence against the sureties, even though they had been notified of the pendency of the suit in which it was recovered. The court said that the default or misconduct of the sheriff must be proved the same as if no judgment had been rendered. Where the surety undertakes that he will do a specific act to be ascertained in a given way, as that he will pay a judgment, there the judgment is conclusive on him. "But this rule rests upon the terms of the contract. In the case of official bonds, the sureties undertake in general terms that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general rule that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact that another party has defended the same cause of action and been unsuccessful."[3] There is another

[1] Preslar *v.* Stallworth, 37 Ala. 402.

[2] Kramph's Ex'x. *v.* Hatz' Exrs. 52 Pa. St. 525.

[3] Pico *v.* Webster, 14 Cal. 202, per Baldwin, J. To a similar effect, see Lucas *v.* The Governor, 6 Ala. 826; Gov-

class of cases which hold that a judgment against the officer alone for official misconduct, is *prima facie* evidence of that fact against his sureties, but may be rebutted by them.[1] It has also been held that such a judgment is conclusive evidence of the facts found by it against the sureties of the officer. Where a judgment was, without fraud or collusion, recovered against a constable alone for a wrongful attachment of the goods of a third person, it was held to be conclusive evidence, both as to damages and costs, in an action against him, and the sureties on his official bond, such bond being joint, and not joint and several. The court said there was great conflict of authority on the subject, and the case would be decided on principle. The judgment was conclusive against the constable. The bond was joint, and not joint and several. If the sureties were allowed to defend, the constable would get the benefit of the defense. A joint judgment must be rendered or none, and it more accorded with legal principles that the judgment should be conclusive against all. The court intimated that if the bond had been joint and several, the judgment would have been held only *prima facie* evidence, and the sureties have been allowed to question it.[2]

§ 531. **When judgment against principal on bond to sheriff evidence against surety therein, etc.**—Suit was brought against a high sheriff for the default of his deputy. The deputy had notice of this suit, and defended it, and judgment was recovered against the high sheriff. The high sheriff then sued the deputy and the sureties on his bond. The condition of the bond was that the obligors "should in all respects indemnify and save harmless the sheriff and all other persons from any loss and damage in anywise arising from the conduct of the said deputy in said office." Held, the judgment against the high sheriff was conclusive evidence of the deputy's default against both him and his sureties. The court said the bond was the same in legal effect as if it had provided for the indemnification of the sheriff

ernor *v.* Shelby, 2 Blackf. (Ind.) 26; White *v.* The State, 1 Blackf. (Ind.) 557.

[1] Atkins *v.* Baily, 9 Yerg. (Tenn.) 111; Mullen *v.* Scott, 9 La. An. 173; City of Lowell *v.* Parker, 10 Met. (Mass.) 309; Treasurers *v.* Temples, 2 Spears Law (So. Car.) 48.

[2] Tracy *v.* Goodwin, 5 Allen, 409, per Chapman, J. Holding a judgment against the officer conclusive against the surety, see Evans *v.* Commonwealth, 8 Watts (Pa.) 398; Masser *v.* Strickland, 17 Serg. & Rawle (Pa.) 354; Eagles *v.* Kern, 5 Wharton (Pa.) 144.

against all judgments on account of the deputy.[1] Certain sureties entered into a bond of indemnity to a sheriff, conditioned to indemnify him against all suits, actions, costs, charges and damages, for selling certain goods. Judgment was recovered against him by the owner of the goods in a suit of which the surety had no notice. Held, in a suit by the sheriff against the sureties on the bond, that the judgment was evidence against them "to show that the very thing had happened which the surety contracted that his principal should not allow to happen. Of course it was not conclusive of the amount, for the surety might have shown that the amount was increased by reason of some fault of the sheriff, for which the bond was not intended to secure him."[2] It has been held that "a rule absolute against the sheriff, ordering him to pay over to the plaintiff the amount due upon his *fi. fa.*, is conclusive against the principal, but *prima facie* evidence only against the securities in an action upon the bond" of the sheriff.[3]

§ 532. **When judgment against administrator conclusive evidence against his surety.**—A settlement made by an executor or administrator with, or a judgment rendered against, him in his official capacity by the court in which his accounts must be settled, is generally held to be conclusive evidence against his sureties of the facts thus established, although the sureties were not parties to, and had no express notice of, the proceedings.[4] The reason for this rule is well illustrated by the following extracts from opinions in cases where it has been held: "As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense; but ad-

[1] Crawford *v.* Turk, 24 Gratt. (Va.) 176.

[2] Huzzard *v.* Nagle, 40 Pa. St. 178, per Lowrie, C. J.

[3] Crawford *v.* Word, 7 Ga. 445, per Lumpkin, J.; Taylor *v.* Johnson, 17 Ga. 521.

[4] Garber *v.* Commonwealth, 7 Pa. St. 265; Hobbs *v.* Middleton, 1 J. J. Marsh (Ky.) 176; Ralston *v.* Wood, 15 Ill. 159; Williamson *v.* Howell, 4 Ala. 693. In some cases it has been held that such a judgment or settlement is only *prima facie* evidence against the surety, which may be rebutted by him; see Ordinary *v.* Wallace, 1 Richardson Law (So. Car.) 507; Ordinary *v.* Wallace, 2 Richardson Law (So. Car.) 460; Ordinary *v.* Carlile, 1 McMullan Law (So. Car.) 100; Verret *v.* Belanger, 6 La. An. 109; Canal & Banking Co. *v.* Brown, 4 La. An. 545. See, also, on this subject, as to confession of judgment by an executor, Iglehart *v.* The State, 2 Gill. & Johns. (Md.) 235.

§ 535. **What presumptions arise from non-payment by principal.**—An officer will not be presumed to have applied public funds to his private use, and, as a general rule, in an action where the official conduct of an officer is in question, his pecuniary embarrassments are not competent evidence. But where it appears that he has mixed the public funds indiscriminately with his own, and has been in the habit of paying public demands from his private funds, and *vice versa*, his pecuniary embarassments may be shown as tending to prove a defalcation. The refusal of a county treasurer to pay an order on him, is of itself evidence, when unexplained, that there is no money to meet such demand, and if money ought to be in his hands to pay it, such refusal is evidence of a defalcation, because the presumption is that the officer will do his duty and pay if there are funds. But if he alleges, as a reason for his failure to pay, that the orders are informal or illegal, this rebuts the presumption arising from such non-payment.[1] The mere fact that the maker of a note provided no funds to pay it at the time and place of its maturity, but suffered it to be protested for non-payment, has been held not to furnish *prima facie* evidence that the maker was insolvent when the note fell due.[2]

§ 536. **When surety estopped by recitals of his obligation.**—As a general rule, sureties are estopped to deny the recitals contained in the obligation signed by them. The sureties in a bond which recites that the principal is sheriff, are estopped from denying the fact,[3] or showing that he never took the oath of office, and consequently was not legally sheriff.[4] The sureties in an attachment bond, which recites that certain funds have been seized on attachment, are estopped to deny that fact.[5] Where a party gave two sureties a writing, which stated that he had received a certain amount of money from the principal, and provided that he should save the sureties harmless to that amount, it was held, in a suit by the sureties against him on this instrument, that he was estopped to deny that he had received such sum.[6] Parol evidence is admissible to show that a bond on its face, purporting to be delivered absolutely, was in fact delivered as an escrow.[7] A

[1] Nolley *v.* Callaway County Court, 11 Mo. 447.

[2] Ranson *v.* Sherwood, 26 Ct. 437.

[3] Brown *v.* Grover, 6 Bush (Ky.) 1.

[4] Police Jury *v.* Haw, 2 La. (Miller) 41.

[5] Price *v.* Kennedy, 16 La. An. 78.

[6] Drury *v.* Fay, 14 Pick. 326.

[7] Crawford *v.* Foster, 6 Ga. 202.

statute prohibited leases from being made to slaves. A slave made a lease with surety, it being recited in the lease that the slave was a free woman: Held, that the surety when sued on the lease might set up the fact of slavery as a defense, and was not estopped by the lease to show it. The court said: "If it be true, that it is against the policy of the law that a slave should rent a house in the city of New Orleans, it is obvious that a contract of this kind is radically null and void, and that whatever devices were resorted to for the purpose of evading the law, may be met by parol evidence, adduced even in behalf of the contracting parties. The admission in that contract of lease, that Mary Wise was a free woman of color, does not debar her co-defendants from proving the contrary.[1]

§ 537. **Miscellaneous cases as to evidence in suits against sureties.**—The principal in an overdue note, paid a sum to the creditor, and an agreement for extension was signed, stating that such sum was paid on the principal of the note: Held, the sureties on the note could not, in a suit against them, show that the sum paid was on account of interest, for that would be to contradict the writing.[2] On the same principle, where a guaranty, clear and unambiguous on its face, was construed to be not continuing, it was held that it could not be shown by parol evidence that it was intended to be continuing.[3] Where two parties sign a note, in the body of which one is described as principal and the other as surety, and one of them pays it, it may be shown by parol in a suit by him against the other, that the note was given for a partnership debt for which both were equally liable.[4] In an action on the guaranty of a note, it is not necessary to prove the signature of the maker. It is sufficient if the signature of the guarantor is proved.[5] If a promissory note, payable to a firm and indorsed by the firm for the accommodation of the maker, is in the hands of the maker, that is sufficient evidence of notice, to a purchaser of the note, of the fact of suretyship.[6] The mere fact that the holder of a note presented it for payment when due, and caused it to be protested and notice thereof to be given to the indorser, does not furnish *prima facie* evidence

[1] Levy v. Wise, 15 La. An. 38, per Voorhies, J.

[2] Halliday v. Hart, 30 New York, 474.

[3] Hall v. Rand, 8 Ct. 560.

[4] Pollard v. Stanton, 5 Ala. 451.

[5] Cooper v. Dedrick, 22 Barb. (N.Y.) 516.

[6] Hendrie v. Berkowitz, 37 Cal. 113.

of the use of due diligence to collect the note.[1] Where the court, in which a recognizance is entered, decides that the principal does not appear, the sureties therein cannot show in a suit against them, that he did appear.[2]

[1] Ranson v. Sherwood, 26 Ct. 437.

[2] People v. Wolf, 16 Cal. 385.

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